Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE S. FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR and J. JERRY SHIELDS,

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the federal circuits are in total disagreement regarding the appropriate standard to apply to federal substantive due process challenges of local zoning decisions (*Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992)):

1. Whether it is arbitrary, capricious and unreasonable in violation of federal substantive due process for a municipality to enact and enforce a zoning ordinance without balancing the present and future needs of the community with the rights of private landowners through the use of a comprehensive plan, or alternatively without using any planning process or study whatsoever (*Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994)); and

2. Whether it is a *per se* and facial violation of federal substantive due process for a municipality to adopt and apply restrictive zoning without utilizing a comprehensive plan, or alternatively any planning process or study whatsoever (*Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

LIST OF PARTIES

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Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

Petitioners George A. Chiavola and Connie S. Flott respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Missouri Court of Appeals, Western District, in this case, transfer denied by the Supreme Court of Missouri, November 22, 1994.

OPINIONS AND ORDERS BELOW

The opinion of the Missouri Court of Appeals, Western District, is reported at 886 S.W.2d 74. Appendix

(App.), *infra*, A1-A19. The order of the Missouri Circuit Court, Clay County, entered July 29, 1993, granting Petitioners partial summary judgment and entering declaratory judgment, is not reported. It is reprinted in the Appendix, *infra*, A20-A21. The Missouri Court of Appeals, Western District, denied Petitioners' Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. App., *infra*, A22. The Supreme Court of Missouri denied Petitioners' application for transfer on November 22, 1994. App., *infra*, A23.

JURISDICTION

The Circuit Court of Clay County, Missouri entered an order of partial summary judgment and declaratory judgment on July 29, 1993, declaring that Zoning Ordinance No.10 of the Village of Oakwood was arbitrary and unreasonable and therefore facially unconstitutional under the United States and Missouri Constitutions, and statutorily invalid. On August 9, 1994, the Missouri Court of Appeals, Western District, reversed the trial court. The Missouri Court of Appeals, Western District, denied Petitioners' Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. Thereafter, on November 22, 1994, the Supreme Court of Missouri denied Petitioners' timely application for transfer. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, except on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 10, of the Missouri Constitution provides:

> Section 10. That no person shall be deprived of life, liberty or property without due process of law.

The Missouri Statutes governing Zoning and Planning, MO.REV.STAT. §§ 89.040 and 89.340, provide in pertinent part:

> **89.040. Purposes of regulations**
>
> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

> **89.340. City plan, contents – zoning plan**
>
> The commission shall make and adopt a city plan for the physical development of the municipality. The city plan, with the accompanying maps, plats, charts and descriptive and explanatory matter, shall show the commission's recommendations for the physical development and uses of land, and may include, among other things, the general location, character and extent

of streets and other public ways, grounds, places and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment or change of use of any of the foregoing; the general character, extent and layout of the replanning of blighted districts and slum areas. The commission may also prepare a zoning plan for the regulation of the height, area, bulk, location and use of private, nonprofit and public structures and premises, and of population density, but the adoption, enforcement and administration of the zoning plan shall conform to the provisions of sections 89.010 to 89.250.

STATEMENT OF THE CASE

I. THE FACTUAL BACKGROUND

The Village of Oakwood, Missouri is a Missouri municipal corporation located in Clay County, and lies within the Kansas City Metropolitan Region. In March of 1955, the Village's five member governing body, known as the Board of Trustees, adopted Ordinance No.10, which has remained in effect since that time with only minor amendments. Ordinance No.10, the sole zoning ordinance of the Village, restricts all 80 lots located within the Village to large lot exclusive single-family residential use with a minimum lot size of 30,000 square feet. Ordinance No.10 does not permit any multi-family

residential uses and similarly prohibits any type of commercial land use anywhere within the Village. The Ordinance simply publicly adopted a private subdivision plat recorded in 1934, over 60 years ago without change, and has worked a significant hardship on and detriment to Petitioners.

In adopting, maintaining and enforcing Ordinance No.10, the Village judicially admitted and acknowledged in various depositions and interrogatories it has never employed any professional planning staff, has never consulted with any planning, engineering or public works professionals, and has engaged in no comprehensive planning process or study whatsoever. In preparing Ordinance No.10 and subsequent minor amendments to Ordinance No.10, the Village has never adopted a comprehensive plan or city plan as required by Missouri statute. MO.REV.STAT. § 89.040 ("Such regulations shall be made in accordance with a comprehensive plan. . . . ") and § 89.340 ("The commission shall make and adopt a city plan for the physical development of the municipality."). The Missouri Court of Appeals found that the "general plan" for the Village was to establish a small bedroom community, which can only be "inferred" from the existence of Ordinance No.10. App., *infra*, A6.

In 1981, George Chiavola and Connie Flott acquired a tract of land approximately six acres in size, which is located on the western side, and entirely within, the Village of Oakwood. This six-acre tract has approximately 620 feet which fronts directly onto North Oak Trafficway, which comprises a portion of the western border of the Village. In 1955, the area was rural in nature, but today

North Oak Trafficway is a major north-south transportation corridor carrying in excess of 25,000 cars and heavy trucks per day past the Chiavola/Flott tract. App., *infra*, A3. North Oak Trafficway passes through several municipalities in the northern portion of the Kansas City Metropolitan Region, which have zoned the roadway entirely commercial. Numerous retail shopping centers, office buildings, automobile dealerships, gasoline service stations, restaurants, and "fast food" establishments are situated on North Oak. Respondents admitted that no property along the Trafficway from several miles south (Vivian Road) to several miles north of the property (Barry Road) has had development for single-family residential use in more than 11 years. Immediately opposite the Chiavola/Flott property are intense commercial uses which include an automobile muffler shop, an automobile parts store, gasoline service stations, a large automobile dealership, and several office buildings.

In 1990 George Chiavola and Connie Flott petitioned the Village to amend Ordinance No.10 to include a "Local Commercial Zone" and to map 4.7 acres of their six-acre tract within a petitioner-proposed, advanced planned development site plan ordinance. The remaining 1.3 acres of the Chiavola/Flott tract furthest from North Oak Trafficway was to remain zoned for single-family residential use in order to provide single-family residential buffering for the single-family residential properties in the Village lying to the east of the property subject to the rezoning petition. On April 13, 1991, the Village Zoning Commission held a public hearing on the rezoning petition, and subsequently voted to recommend disapproval of the

rezoning. At this hearing, sworn expert planning, engineering, appraisal, environmental and transportation testimony demonstrated that the Chiavola/Flott property was not suited for single-family residential development, that commercial zoning was proper and appropriate, and that the Village had never prepared any plan, study or engaged in any planning process whatsoever in adopting the zoning ordinance in 1955 or to the present. The Village offered no evidence which contradicted the testimony offered on behalf of Chiavola and Flott. On June 3, 1991, the Village Board of Trustees held a public hearing to consider the rezoning petition, and voted without deliberation to deny the Chiavola/Flott petition.

II. PROCEEDINGS IN THE COURTS BELOW

On July 1, 1991, the present action was filed. Count I of the First Amended Petition, filed on April 2, 1993, sought declaratory judgment, alleging that Ordinance No.10 was arbitrary, capricious, unreasonable, invalid, and in violation of Article I, section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because, *inter alia*, Ordinance No.10 was adopted without a comprehensive land plan and was maintained and enforced without the benefit of a comprehensive plan or any comprehensive planning process or study whatsoever. On July 29, 1993, the Circuit Court of Clay County, Missouri granted partial summary judgment and declaratory judgment as to Count I of Chiavola and Flott's First Amended Petition, finding the ordinance unconstitutional on its face under

the federal and Missouri constitutional due process provisions, as well as statutorily invalid. App., *infra*, A20-A21.

The Village of Oakwood and individual defendants appealed this decision to the Missouri Court of Appeals, Western District. On August 9, 1993, the Missouri Court of Appeals reversed the trial court's grant of summary judgment. The court considered separately questions of the facial constitutionality of Ordinance No.10, and the validity of Ordinance No.10 under Missouri statute. The Missouri Court of Appeals considered the following federal question: "Here it is asserted that on its face, Ordinance No.10 is unconstitutional. The due process clauses of the Fourteenth Amendment to the U.S. Constitution and the Missouri Constitution, Art. I § 10, require zoning 'to bear a substantial relationship to health, safety, morals or the public welfare.' " App., *infra*, A5. While the court framed the constitutional issue as a violation of both the United States and Missouri Constitutions, the court only tested Ordinance No.10 under Missouri constitutional standards. App, *infra*, A5-A9. The court found Ordinance No.10 constitutional under the Missouri due process standards.

As to the statutory challenge to Ordinance No.10, the court considered various interpretations by other state courts which dealt with statutory language, identical to the applicable Missouri statute, requiring that zoning ordinances "be made in accordance with a comprehensive plan." MO.REV.STAT. § 89.040. The Missouri Court of Appeals felt that the "better reasoned cases" were those decisions handed down primarily in the 1950s and 1960s that held a separate comprehensive plan was not required

to enact and enforce a valid zoning ordinance. App., *infra*, A13. The court also found that the preamble to Ordinance No.10 met the Missouri statutory comprehensive planning requirements because it indicated an intent on the part of Village Trustees to create a single residential district within the Village.

On October 4, 1994, the Missouri Court of Appeals, Western District, denied Chiavola and Flotts' Motion for Rehearing and Motion for Transfer to the Missouri Supreme Court.

On November 22, 1994, a timely filed Application to Transfer to the Missouri Supreme Court was denied. App., *infra*, A23.

REASONS FOR GRANTING THE PETITION

While the Missouri Court of Appeals, Western District, framed the constitutional issue as a facial violation of the due process clauses of both the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, the court only conducted analysis according to the standards set forth by the Missouri Constitution. The court failed to conduct any analysis which considered the trial court's grant of summary judgment on the grounds that the Village of Oakwood's zoning ordinance was facially unconstitutional as a denial of substantive due process in violation of the Fourteenth Amendment to the U.S. Constitution. App., *infra*, A5-A9. This issue presents an important question of federal law which has not been, but should be,

settled by this Court and is the subject of considerable confusion among the federal circuit courts nationwide.

I. This Court should resolve the sharp conflict that exists among the federal circuits regarding the proper standard to apply to federal substantive due process challenges of municipal zoning decisions.

It is a violation of substantive due process for a property owner to be subjected to arbitrary and capricious government action in the denial of a rezoning request. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928). While this Court has held that review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, the Court has never set forth a definitive standard of review. The Court has explicitly declared, however, that property owners have a substantive due process right not to be subjected to arbitrary, capricious or irrational zoning decisions. This case presents the inescapable conclusion that a zoning ordinance adopted and maintained without any study, plan or planning process violates such a standard. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974).

The federal circuits are in hopeless disarray regarding the proper standard to be applied to substantive due process challenges of zoning decisions. On this matter, the Sixth Circuit Court of Appeals has opined in despair: "The lack of uniformity among the circuits in dealing

with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992).[1]

The First, Fifth, Seventh, Ninth and Eleventh Circuits demonstrate great reluctance to intervene in local zoning matters. *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982). These circuits classify all zoning decisions, even as they pertain only to an individual parcel of land as in the present case, as legislative. *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243-45 (1st Cir. 1990); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.), *cert. denied*, 498 U.S. 1120 (1991). These circuits exercise extreme deference to local zoning decisions, and all factual issues are

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[1] Upon its review of the disarray among the circuits, the Sixth Circuit lamented, "We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to wait action by the Supreme Court." *Pearson*, 961 F.2d at 1220 n. 45. *Pearson* provides the Court with an excellent opportunity to appreciate fully the confusion that has been the result of this Court's inopportunity to set forth the standard of review for substantive due process challenges of zoning decisions. Since the time that this Court established the rule that the denial of substantive due process results from arbitrary or irrational zoning actions, *Euclid*, 272 U.S. at 395, the issue has been permitted to percolate among the federal circuits for a sufficiently long period of time to allow the circuits to establish conflicting standards.

subject to only a very limited scope of review reserved for legislative judgments. Bad faith violations of state law do not rise to the level of an unconstitutional deprivation of substantive due process. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). In addition, "Courts have confused the standards" for just compensation, due process takings, and arbitrary and capricious due process, and "often cannot tell which claim has been brought or which standard is being applied." *Eide*, 908 F.2d at 722.

In contrast, the Sixth Circuit recognizes a distinction between zoning actions which are legislative in nature, and those as in our present case which involve administrative/adjudicative decisions which affects a zoning change for an individual parcel of land. A decision rendered by a legislative body that affects only a small number of persons, or alters the zoning of a specific parcel of land, is an administrative decision. When this is the case, as in the present case, the federal court is authorized to review the evidence that was before the state administrative agency or legislative body acting in adjudicative fashion. *Pearson*, 961 F.2d at 1222. Whereas, in reviewing legislative acts, the only permissible inquiry is whether the legislative action is rationally related to legitimate state land use concerns. *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992).

The Second and Tenth Circuits impose a strict property rights test as the first element of any substantive due process challenge to zoning decisions. This standard requires the property owner to demonstrate a constitutionally protected property interest before the court will consider whether governmental action has resulted in the

denial of substantive due process for a rezoning request. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915-16 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991) ("Authority in this circuit is unclear on what interest is required to trigger substantive due process guarantees."). The Third Circuit, in contrast, specifically declines to engage in the initial property interest test. *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851, *cert. denied*, 488 U.S. 868 (1988).

The Third and Fourth Circuits, contrary to the other circuits, will grant relief based on substantive due process grounds if the zoning decision is irrational in the strict sense, or prompted by political, personal or discriminatory motives. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir.), *cert. denied*, 112 S.Ct. 1668 (1992); *Bello*, 840 F.2d at 1129; *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989).

The Eighth Circuit is internally embroiled in a conflict regarding the proper standard to be applied to substantive due process challenges of zoning decisions. *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1987), represents a standard that virtually forecloses any possibility of mounting a successful challenge to zoning decisions on substantive due process grounds. Only if the denial of a rezoning application is based on the equivalent of a coin flip would the *Lemke* court find a substantive due process violation has occurred. *Id.* at 472 (Arnold, J., concurring).[2]

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[2] "Such claims should, however, be limited to the truly irrational – for example, a zoning board's decision made by

The same court ruled in *Littlefield v. City of Afton*, 785 F.2d 596, 603 (6th Cir. 1986), that an arbitrary and capricious condition imposed on the granting of a permit states a valid substantive due process claim. *Accord Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986). Judge Arnold acknowledged in his concurring opinion in *Lemke* that *Lemke* cannot be harmonized with either *Littlefield* or the views of the other federal circuits. *Lemke*, 846 F.2d at 472 (Arnold, J., concurring).

Even if the deferential "coin flip" standard articulated by the Eighth Circuit were applied to this case, *Lemke*, 846 F.2d at 472, Ordinance No.10 would still not pass muster. It is patently arbitrary, unreasonable and irrational for the Village Trustees to decide in 1955 that the Village should be forever maintained as an insular residential community without the guidance of any plan, study or planning process whatsoever and without any concern for the changes occurring over the next 40 years. The Court should take this opportunity to harmonize the conflicting standards for federal substantive due process violations as articulated by the circuits. The Court will rarely be faced with a more glaring example of a split

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flipping a coin, certainly an efficient method of decisionmaking, but one bearing no relationship whatever to the merits of the pending matter." *Lemke*, 846 F.2d at 472 (Arnold, J., concurring). The court acknowledged that this effectively eliminated the possibility of a successful substantive due process challenge, pointing out that the Equal Protection Clause and other provisions of the Bill of Rights would continue to protect property owners. One should question, however, whether a zoning ordinance based on no study, plan or planning process could ever meet any rational basis test, no less even a coin flip.

among the federal circuits or a more patently irrational decision than a zoning regulation adopted without plan, study or planning process whatsoever. In addition, the Missouri Court of Appeals and other state courts need guidance regarding the proper standard to apply to the federal question presented by Petitioners' substantive due process challenge.

II. This Court should declare that it is a *per se* violation of federal substantive due process to enact and enforce a zoning ordinance without utilizing any plan, study or planning process to identify and support the future needs and land use policies of the community.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court was presented with a facial attack of a zoning ordinance on the grounds that it was violative of the due process clause of the Federal Constitution. This Court held that, "Before the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. In reaching its decision that the Village of Euclid had not violated federal substantive due process, the Court was fully informed by "comprehensive reports . . . which bear every evidence of painstaking consideration" that the division of residential, commercial and industrial areas was a valid municipal power. *Id.* at 394. *Euclid*, then, lays the foundation for Petitioners' argument that any zoning ordinance imposed upon the entirety of a community must be documented and supported with a comprehensive planning process.

In the present case, the Village of Oakwood has engaged in absolutely no study, plan or planning process with which to inform the Village Trustees' judgment that Oakwood should be established as, and forever maintained as, a "small bedroom community."[3] The Village has made no accommodation for those property owners who live along North Oak Trafficway, a totally commercialized transportation corridor, who wish to utilize their property in a manner which allows some use or value and which reasonably protects the remainder of the Village's residential character.

Zoning in this manner without planning becomes so haphazard and damaging to property rights as to rise to the level of arbitrary and irrational action which is sufficient to constitute a violation of basic substantive due process rights. "[T]o the extent that zoning is properly to be conceived of as the partial implementation of a plan of broader scope, zoning without planning lacks coherence

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[3] The Missouri Court of Appeals stated "there is evidence that planning was done. . . . " App., *infra*, A18. The court provides no citation to any planning documents, no reference to any official Village documents, no citation to any hearing transcripts, and no reference to any activities conducted by the Village which would provide such evidence. The court further indicated that, "The ordinance was comprehensive in scope; setting out the area, height, and use requirements." App., *infra*, A18. In this analysis, the court has fallen victim to confusing an ordinance which fully regulates each aspect of the permitted uses, and an ordinance which is the product of a *comprehensive planning process* which is conducted prior to, and separate from, enactment of the zoning ordinance. Daniel Mandelker, *The Role of the Comprehensive Plan In Land Use Regulation*, 74 MICH.L.REV. 900 (1976).

and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve." Charles M. Harr, *In Accordance With a Comprehensive Plan*, 68 HARV.L.REV. 1154 (1955). To ensure a rational allocation of land use, a municipality must undertake *some* manner of planning process to identify the needs and policies of a community with forethought toward the community's future land use problems. D. Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH.L.REV. 900 (1976). Zoning will serve to "tyrannize individual property owners" if there is not at least a minimal effort to comply with the requirement that zoning be "in accordance with a comprehensive plan." *Udell v. Haas*, 235 N.E.2d 897 (N.Y.Ct.App. 1968); *see also* MO.REV.STAT. §§ 89.040 and 89.340.

This Court has recently declared that certain actions by a municipality may result in a categorical, or *per se*, violation of property rights. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2895 (1992), the Court declared that when the owner of real property has been called upon to sacrifice all economically beneficial uses of his land for the public good, he has suffered a *per se* taking.[4] In *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2321

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[4] This Court emphasized in *Lucas* that its decision was grounded upon two discrete classes of regulatory action which created categorical takings: 1) compensation is required for physical invasions of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and 2) compensation is required for regulation which denies all economically beneficial or productive use of land, *Agins v. Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

(1994), the Court decided that a municipality had not met its burden in establishing the need for a property owner to dedicate a portion of her real property to the city in exchange for a building permit. The *Dolan* decision was grounded upon the supposition that "[c]ities have long engaged in the commendable task of *land use planning*, made necessary by increasing urbanization particularly in metropolitan areas such as Portland." *Dolan*, 114 S.Ct. at 2322 (emphasis supplied). The Court specifically struck down regulatory provisions requiring dedication of land where there was no study to support the required proportionality of the dedication. The same holds true for the Kansas City Metropolitan Region, wherein the Village of Oakwood is attempting to maintain an insular, parochial, exclusionary residential community without any comprehensive plan, study or any comprehensive planning process whatsoever to accommodate and adapt the Village borders to the surrounding commercialization. The total lack of study and analysis is similar to this Court's *Dolan* decision in that its development approval condition of a dedication of land was void without *an appropriate study of its proportionality*.

III. This case presents a question of critical national importance.

Nearly all states have enacted enabling legislation for municipal planning and municipal zoning based on the Standard City Zoning Enabling Act drafted in 1926 by an

advisory committee to the Department of Commerce.[5] Section 3 of that act provides that zoning ordinances shall be made "in accordance with a comprehensive plan." All states which have passed enabling legislation based on the act have used this or substantially similar language to require that zoning be made on a base which is broader than itself.

The states which have enacted this language through their zoning enabling legislation fall into three categories regarding the planning that a municipality must undertake. The oldest view, as exemplified by the cases cited in the opinion below, is that a municipality does not need to enact a separate comprehensive plan but the zoning ordinance must represent in itself a rational planning exercise document. A second view is that a zoning ordinance adopted without a comprehensive plan will be a negative factor in weighing the constitutional reasonableness and validity of land use action. *See, e.g., Sharp v. Zoning Hearing Bd.*, 628 A.2d 1223 (Pa.Commw.Ct. 1993); *Udell v. Haas*, 235 N.E.2d 897 (N.Y.Ct.App. 1968). The current majority trend and third view is that the comprehensive plan is a separate and dispositive document in weighing the validity of land use action.[6]

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[5] Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, A Standard City Zoning Enabling Act (1926).

[6] A large number of recent decisions confirms that the modern trend is to require a separate comprehensive plan with zoning ordinances in substantial conformity with that plan in order to support rational land use decisions. *See, e.g., F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992); *Larson v. Wallowa County*, 840 P.2d 1350 (Or.Ct.App. 1992); *Lawler v. City*

Regardless of which view a state takes regarding the consistency required between the zoning ordinance and comprehensive planning, *all states assume that a municipality undertakes some form of comprehensive planning process.* It is the definition of arbitrary, capricious and unreasonable action for municipal officials to enact a zoning ordinance without considering the needs, requirements and future policies of the municipality before and after passing and enforcing the zoning ordinance. This Court should declare that to impose zoning requirements upon all property owners without conducting even a minimal amount of planning or study is arbitrary, capricious and unreasonable and a *per se* violation of substantive due process.

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of Redding, 9 Cal.Rptr.2d 392 (Cal.Ct.App. 1992); *Board of County Comm'rs v. Snyder*, 627 So.2d 469 (Fla. 1993); *City Council of Sussex County v. Green*, 516 A.2d 480 (Del. 1986); *Kaiser Hawaii Kai Dev. Co. v. City of Honolulu*, 777 P.2d 244 (Haw. 1989); *Pro-Eco, Inc. v. Board of Comm'rs*, 766 F.Supp. 1368, *aff'd*, 956 F.2d 635 (7th Cir. 1992) (Indiana); *Balser v. Kootenai County Bd. of Comm'rs*, 714 P.2d 6 (Id. 1986); *City of Lakeside Park v. Quinn*, 672 S.W.2d 666 (Ky. 1984); *Little v. Board of County Comm'rs*, 631 P.2d 1282 (Mont. 1981); *Zanin v. Iacono*, 487 A.2d 786 (N.J.Super.L. 1984); *Nova Horizons, Inc. v. City Council*, 769 P.2d 721 (Nev. 1989); *Camara v. City of Warwick*, 358 A.2d 23 (R.I. 1976); *Smith v. Town of St. Johnsbury*, 554 A.2d 233 (Vt. 1988). This Court considered the decisions and legislation of the states in the *Dolan* case in establishing the constitutional standard of rough proportionality backed by proper planning and studies. *Dolan*, 114 S.Ct. 2309 (1994).

CONCLUSION

Because of the importance of the questions presented, and for all of the reasons stated, George A. Chiavola's and Connie S. Flott's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District, should be granted.

Respectfully submitted,

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February 17, 1995

APPENDIX

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE of Missouri ex rel. George A. CHIAVOLA and Connie S. Flott, Respondents, v. The VILLAGE OF OAKWOOD, Missouri, Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr and J. Jerry Shields, Appellants.	Case No. WD 48239 Opinion Filed: August 9, 1994

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
Honorable David W. Russell, Judge
Before Lowenstein P.J., Spinden and Berrey, JJ.

This appeal stems from a trial court determination that the single zoning ordinance (Ordinance No. 10) of the Village of Oakwood (Oakwood), which allows only single family residential usage in Oakwood: (1) is unconstitutional on due process grounds; and (2) as being infirm because Oakwood failed to develop a comprehensive plan under s 89.040, RSMo 1986. The Appellant, Oakwood, is a small bedroom community located in Clay County, and is a suburb of Kansas City. Oakwood consists of 80 single family dwellings on 80 platted lots.

The Plaintiffs/Respondents (Landowners) filed a multi-count petition. The trial court granted summary

judgment on Count I which prayed for a declaration that Ordinance No. 10, and "all zoning ordinances" of Oakwood, were unconstitutional both facially, and as applied[1] to Landowners and for the municipality's failure to have a separate comprehensive plan. The remaining counts, which prayed for damages under several theories, were not reached since they hinged on the ruling of Count I. Pursuant to Rule 74.01(b) the trial court determined the appealability in its declaration that its ruling was final and appealable. The trial court did not take up Landowners' request for attorney fees in Count I, under 42 U.S.C. s 1988 and under Missouri Declaratory Judgment Act ss 527.010 – .130 RSMo 1986, or in any of the other five counts. Landowners have cross-appealed on this non-ruling of attorney fees. Their cross-appeal will be addressed at the end of this opinion.

At the very heart of this appeal lies the issue of whether a Missouri municipality may enact valid zoning ordinances without having first formally adopted a "comprehensive plan," under s 89.040, which provides that regulations on zoning and districts " . . . shall be made in accordance with a comprehensive plan. . . . "

Summary judgment was granted on the portion of Landowners' petition which sought declaratory relief

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[1] The issue of whether Ordinance No. 10 is unconstitutional as it applied to Chiavola and Flott was not preserved on appeal. Both parties directed their efforts towards the facial unconstitutionality of Ordinance No. 10 and therefore we focus on that issue. This court finds even had they chosen to assert an as applied argument, the Ordinance was constitutional as it applied to their land.

from Oakwood's only ordinance, Ordinance No. 10, relating to zoning and land use. Ordinance No. 10 was adopted in 1955, shortly after residents of a housing subdivision were incorporated as a village under s 80.020 RSMo 1986. The ordinance limited the use of the 80 lots comprising Oakwood to single-family residential use with a lot size of 30,000 square feet.

Oakwood is now bordered by a major thoroughfare, North Oak Trafficway (North Oak), as well as a portion of Kansas City and other villages in Clay County. North Oak carries approximately 25,000 cars per day and contains many commercial properties in the other municipalities it passes through.

In 1981 the Landowners, Chiavola and Flott purchased a house in Oakwood located on a six acre lot. They sought to rezone the portion of their land which abuts North Oak, approximately 4.7 acres, for commercial use. Oakwood's zoning commission, and later its trustees, denied the rezoning petition. The circuit court reversed, holding among other reasons; Ordinance No. 10 was invalid because Oakwood had not previously adopted a "comprehensive plan" pursuant to chapter 89, and the ordinance would not suffice as both the zoning "plan" and the zoning ordinance. As a result of the demise of Ordinance No. 10 Oakwood presently has no zoning ordinance on any land within its boundaries.

Ordinance No. 10 was the product of an Oakwood Zoning Commission hearing held in February, 1955, which recommended to the Trustees that the boundaries of Oakwood be zoned as "one residential district." Attached to the Commission's report was a description of

the 80 lot plats of Oakwood. The report and subsequent ordinances provided for streets and parks but no commercial areas. This ordinance was passed in March, 1955. Although amendments were made to Ordinance No. 10 in 1966 and 1967, Oakwood has limited the land use to single-family dwellings.

There are two arguments which Oakwood, Appellants, presents as error to this court: 1) Ordinance No. 10 is not facially unconstitutional; and 2) it is not statutorily invalid. The parties, in both their briefs and arguments, seem to confuse the issues of constitutionality and statutory validity. This opinion will first outline the constitutional issues, and then the statutory issue. This court finds Ordinance No. 10 to be both constitutionally and statutorily sound and, therefore, reverses the judgment. Landowners cross-appeal is dismissed.

Standard of Review

Since zoning and refusal to rezone are legislative acts, this court reviews de novo any challenges to their validity. *J.R. Green Properties, Inc. v. Bridgeton*, 825 S.W.2d 684, 686 (Mo.App.1992); *Elam v. St. Ann*, 784 S.W.2d 330 (Mo.App.1990). This court is to first determine whether or not the legislative judgment was fairly debatable, and if it is, then the decision must stand. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Binger v. Independence*, 588 S.W.2d 481 (Mo. banc 1979). There is a presumption of validity for zoning ordinances; the presumption is rebuttable, but Landowners bear the burden of proving Ordinance No. 10 is unreasonable in order to successfully rebut the presumption. *Elam*, 784

S.W.2d at 335; *Flora Realty & Inv. Co. v. Ladue*, 362 Mo. 1025, 246 S.W.2d 771, 778 (banc 1952). Where there is uncertainty regarding the reasonableness of a zoning regulation, it is to be resolved in the government's favor. *Flora Realty*, 246 S.W.2d at 778.

I. Constitutional Attack

A. Reasonableness

The first point on appeal is that the court erroneously held Ordinance No. 10 to be unconstitutional. An ordinance may be either facially unconstitutional or unconstitutional as applied to a particular tract of land. Here it is asserted that on its face, Ordinance No. 10 is unconstitutional. The due process clauses of the Fourteenth Amendment to U.S. Constitution and the Missouri Constitution, Art. 1 s 10, require zoning "to bear a substantial relationship to health, safety, morals or the public welfare." *Flora Realty*, 246 S.W.2d at 778. The constitutional standard is essentially one of reasonableness. *White v. Brentwood*, 799 S.W.2d 890, 892 (Mo.App.1990), (citing *Vatterott v. Florissant*, 462 S.W.2d 711, 713 (Mo.1971)). Zoning may be unreasonable on its face or as applied to a particular tract of land. In Missouri, courts not only "determine whether application of the zoning is substantially related to the alleged purpose of the zoning, but also the private detriment caused by such application." *Elam v. St. Ann*, 784 S.W.2d at 334. Therefore, even where the zoning is related to the public welfare, the zoning may be considered unconstitutional where it demonstrates a detriment to private interests which outweighs the public benefit from retaining it. *Id.* at 334-335.

What is reasonable depends on the requirements of the locality, for what might be reasonable in one place may be unreasonable in another. *Flora Realty,* 246 S.W.2d at 778. The fact that economic loss will be sustained if the ordinance is upheld is not controlling; nor does the fact that neighboring or adjoining land is less restrictively zoned establish that the regulation is arbitrary or unfairly discriminatory. *Id.* at 779.

Here the zoning regulation, calling for single-family residential use, is facially reasonable. The general plan, as it can be inferred from Ordinance No. 10, its amendments via subsequent ordinances, and the development of Oakwood, was to establish a small bedroom community consisting of 80 homes. The ordinance provided for the single-family homes, churches and community buildings, public parks, and accessory uses customarily incident to the other allowable uses not involving the conduct of business or industry. This court cannot say the zoning ordinance does not bear a substantial relationship to public health, safety, morals or general welfare and, therefore, is unreasonable or, that the detriment to Landowners outweighs the public benefits.

B. Comprehensive Single Use Zoning

The judgment also infers the ordinance is facially unconstitutional because it provides for only one type of zoning . . . single-family residential. *McDermott v. Calverton Park,* 454 S.W.2d 577 (Mo. banc 1970), controls on this issue. The Court in *Calverton Park* overruled a portion of its earlier ruling in *Moline Acres v. Heidbreder,* 367 S.W.2d

568 (Mo.1963), which held a municipality could not adopt a single-use zoning ordinance.

In Moline Acres, the city was incorporated as a village and adopted a single-use zoning ordinance. The Court held the Missouri statutes were "never intended . . . to give to a municipality the power to adopt a one use district zoning ordinance encompassing the whole town." *Id.* at 573. Thus, the Court found the village lacked the authority to enact such an ordinance. *Id.*

The Supreme Court of Missouri, in *Calverton Park* specifically overruled the quoted portion of *Moline Acres* saying, "We have read and reread the applicable statutes and find nothing therein to indicate a legislative intent that, under all circumstances, a municipality must provide for more than one use in its zoning ordinance." *Calverton Park,* 454 S.W.2d at 577. This is especially true for small bedroom communities situated in large metropolitan areas. *Id.* at 581. In *Calverton Park,* the village consisted of approximately 1700 residents and was situated between the cities of Florissant and Ferguson in the St. Louis area. *Id.* at 579. Due to its location, there was an abundance of commercial facilities located within a short distance from the village. *Id.* at 580. The ordinance in question allowed for public buildings, parks, golf courses and four zoning districts, all of which were restricted to single-family residential use. *Id.* at 579.

Clarkson Valley Estates Inc. v. Clarkson Valley, 630 S.W.2d 151 (Mo.App.1982) further supports the proposition that single-use zoning is legally permissible. In Clarkson Valley, the court held single-family residential zoning for the entire village was "legally permissible and

factually justified given the nature of the community involved." *Id.* at 153. The Village of Clarkson Valley was incorporated in 1952 and zoned primarily as single-family residential area. *Id.* at 152. Several years later, a landowner in the village attempted to develop his 25 acres of land commercially and, as a result, the village rezoned his portion of land as commercial. The residents of the village were adamantly opposed to the rezoning. *Id.* at 152. A short time later the village returned to the single-family residential zoning and the landowner was prohibited from any further commercial development. *Id.* at 153.

Under s 89.020 RSMo 1986, the legislative body of Oakwood is permitted to use zoning to promote health, safety, morals, and general welfare of its residents. "Certainly, where commercial and professional services are conveniently available elsewhere, none of those purposes would be enhanced by multiple-use zoning as compared to one-family dwelling use." *Calverton Park,* 454 S.W.2d at 582. In addition, the objectives of s 89.040 are to "lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; and to avoid undue concentration of population." Those objectives are better served by a single-use zoning ordinance than they would be from multiple-use zoning in such a small area. *Id.* The Village of Oakwood is a bedroom community which has been divided into 80 lots and borders the neighboring city of Gladstone near North Oak Trafficway, Barry Road and Vivion Road (all heavily traveled thoroughfares). There are numerous commercial facilities located a short distance from Oakwood. Given the nature of the community,

it was appropriate for Oakwood to zone all of the land in its boundaries as single-family residential.

C. Comprehensive Plan

Contrary to the assertion by Landowners, there is no requirement for the existence of a separate comprehensive plan in order for a zoning regulation to be constitutional. While the existence of a separate well-delineated plan may make it easier to establish an appropriate use of Oakwood's police power, and the reasonableness of the regulation or ordinance, it is not a constitutional requirement. *See, e.g., Central Motors Corp. v. City of Pepper Pike,* 63 Ohio App.2d 34, 409 N.E.2d 258, 280 (1979); *Bruno v. Brown,* 414 Pa. 361, 200 A.2d 405 (1964). If it were a constitutional requirement, all zoning prior to the enactment of s 89.040 which requires all zoning to be done "in accordance with the comprehensive plan," would have been unconstitutional. Furthermore, even if it were a constitutional requirement, a plan may be inferred from Ordinance No. 10, and Oakwood's subsequent zoning ordinances (specifically ordinances 33, 46, 48, and 66), that Oakwood planned on being a small residential bedroom community.[2]

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[2] s 89.140 RSMo 1986 provides:
Previous ordinances to remain in force: Wherever any municipality pursuant to an act of the legislature of this state shall have adopted an ordinance or ordinances for any of the purposes covered by sections 89.010 to 89.140, such ordinance or ordinances shall be deemed to have been adopted under the provisions of sections 89.010 to 89.140, and it shall not be

II. Statutory Attack

The second part of the appeal is that Ordinance No. 10 is invalid due to Oakwood's failure to provide a comprehensive plan pursuant to s 89.040 RSMo 1986. s 89.040 provides:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air- . . . . Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality. (emphasis added).

In their petition, Landowners assert, since there is not a separate document or documents designated as the "comprehensive plan," Oakwood did not comply with the statute. Remember that the requirement of a plan is based on the premise that zoning regulations are not an end in

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> necessary in such cases for the local legislative body to appoint a zoning commission as provided in section 89.070. All such ordinances shall remain in full force and effect except so far as they shall be inconsistent with the provisions of sections 89.010 to 89.140, until they shall have been amended, altered or repealed by such legislative body.

There is some argument, although not put forth by Oakwood, that the preamble to Ordinance No. 10 was itself a comprehensive plan and therefore satisfies 89.040 pursuant to this statute. This opinion, however, proceeds under the theory that there was no separate plan.

and of themselves, but are the means to the end to sound planning for the public good. *Dawson v. Blaine County*, 98 Idaho 506, 509, 567 P.2d 1257, 1260 (1977). Zoning "does no more than apply the rules of good housekeeping to public affairs. It keeps the kitchen stove out of the parlor, the bookcase out of the pantry, and the dinner table out of the bedroom." *Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112, 121 (1965) (Murphy, J., dissenting) (citing Metzenbaum, Law of Zoning (1930) p. 6) (Judge Murphy dissents because the zoning provision in Woods did not regulate use in addition to the area). The requirement of a comprehensive plan is not a 'mere technicality which serves only as an obstacle for public officials to overcome in carrying out their duties" but, rather, is the essence of zoning. *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897, 900-901 (1968). Without a plan there can be no rational allocation of land use. *Id.* The crux of this appeal is the question: what form must a comprehensive plan take in order to comply with s 89.040?

There is no definition of a comprehensive plan in chapter 89, governing zoning and planning of municipalities in Missouri. The language used in the Missouri statute mirrors that used in the Standard State Zoning Enabling Act, which has acted as the model for a majority of the states – i.e., all regulations must be "in accordance with the comprehensive plan." While there is not an exact definition, it can be said that a:

> " 'plan' connotes an integrated product of a rational process and "comprehensive" requires something beyond a piecemeal approach, both to be revealed by the ordinance in relation to the physical facts and the purposes authorized" by

statute. *Kozesnik v. Montgomery, Twp.*, 24 N.J. 154, 131 A.2d 1 (1957).

Oakwood cites *Strandberg v. Kansas City,* 415 S.W.2d 737 (Mo. banc 1967) as providing the definitive answer to this case. This court does not agree. In *Strandberg,* the city had a comprehensive plan, but it was not enacted by the City Council of Kansas City. The court noted that in a:

> "narrower sense there is a comprehensive plan for each of the districts in that the regulations and restrictions must be uniform for each class or kind of building throughout each district. In a larger sense the term may properly be applied to the general zoning ordinance in effect at a particular time including all valid amendments thereto." *Id.* at 744. (cites omitted).

The Court didn't reach the issue of whether a separate plan must exist in order for the zoning ordinance to be valid. This court notes, however, the Eastern District has held that, "Generally, the comprehensive plan referred to in the decisions are the zoning ordinances and maps." *Treme v. St. Louis County,* 609 S.W.2d 706, 715 (Mo.App.1980), citing *Strandberg,* 415 S.W.2d 737.

No additional guidance is provided for the 89.040 language "comprehensive plan" in the statutes. This court therefore, looks to other jurisdictions for guidance. The notes accompanying the 1926 version of the Standard State Zoning Enabling Act indicate:

> " . . . the draftsman intended to require some planning as an integral part of the zoning process. It is equally clear that no provision for the preparation or adoption of a written plan beyond the text of the zoning ordinance was

> spelled out in the act or referred in the notes. It remained for the courts to give dimension to the requirement that zoning regulations be made in accordance with a comprehensive plan." *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 509, 567 P.2d 1257, 1260 (1977) (citing 1 Anderson, American Law of Zoning s 5.03, p. 265 (2nd Ed.1976)).

This court finds the better reasoned cases, as they apply to the fact pattern at hand, are those which do not require a comprehensive plan separate and apart from the zoning ordinance itself. This court holds a comprehensive plan may be validly enacted in an ordinance itself without existing in some form separate from the ordinance. *See Furtney v. Simsbury Zoning Com.*, 159 Conn. 585, 271 A.2d 319 (1970); *Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112 (1965); *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977) (superseded by legislative act requiring passage of a comprehensive plan prior to zoning ordinances); *Drake v. Craven*, 105 Idaho 734, 672 P.2d 1064 (App.1983); *Nottingham Village Inc. v. Baltimore County*, 266 Md. 339, 292 A.2d 680 (1972); *Allred v. Raleigh*, 7 N.C.App. 602, 173 S.E.2d 533 (1970); *Kozesnik v. Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957); *Asian Americans For Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265 (1988); *Osiecki v. Huntington*, 170 A.D.2d 490, 565 N.Y.S.2d 564 (2 Dept.1991). *See Bousquet v. Transportation Ins. Co.*, 354 Mass. 152, 235 N.E.2d 807 (1968); *Columbia Oldsmobile Inc. v. City of Montgomery*, 56 Ohio St.3d 60, 564 N.E.2d 455 (1990); *Tulsa Rock Co. v. Board of County Comm'rs*, 531 P.2d 351, 357 (Okla.App.1974); *Bruno v. Brown*, 414 Pa. 361, 200 A.2d 405 (1964); *Bell v. Elkhorn*, 122 Wis.2d 558, 364 N.W.2d 144 (1985). Comprehensiveness may be found in the fact the ordinance zones all, or

substantially all, of a political subdivision; that it regulates all uses; or that it covers all of the usual factors of land utilization, height area and use. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv.L.Rev. 1154, 1158-1167 (1955).

First, in looking at the statutes themselves, there is no mandate requiring Oakwood to adopt a separate plan as a condition precedent to the enactment of the ordinance. *Central Motors Corp.*, 409 N.E.2d at 280; *Dawson*, 567 P.2d at 1261. Furthermore, "the general rule has become . . . that, absent specific requirements in enabling legislation, the comprehensive plan need not have a separate physical existence apart for the zoning ordinances, and it need not be in writing, but its design may be found in the scheme apparent in the zoning regulations themselves." *Dawson*, 567 P.2d at 1261 (cites omitted). Where the enabling statute expressly requires the adoption of a comprehensive plan as a condition precedent to the passage of zoning regulations and ordinances, then a different result must occur. *Id.* 567 P.2d at 1262; *Baker v. Milwaukie*, 17 Or.App. 89, 520 P.2d 479 (1974); *Pro-Eco v. Board of Comm'rs*, 956 F.2d 635 (7th Cir.Ct.App.1992).

There are a number of cases from other jurisdictions which have been faced with the issue now before this court.

Kozesnik v. Montgomery Twp., 24 N.J. 154, 131 A.2d 1 (1957), an oft-cited case, is one of the earlier cases to attack this question. In Kozesnik, the plaintiff landowners challenged the validity of amendments to zoning ordinances of two townships, Hillsborough and Montgomery, proposed by a rock mining company (Minnesota Mining

and Manufacturing Co.). The amendments permitted the mining company to quarry and process rock in Hillsborough and establish a plant to color the rock for roofing granules in Montgomery. At the time of the application for amendment the relevant areas were zoned for agricultural or residential uses. Both townships had few people living in them; most of the land in the townships was used for farming, a few businesses were also there. *Id.* 131 A.2d at 4-5.

Plaintiffs contended the amendments were not in accordance with the comprehensive plan. *Id.* 131 A.2d at 6. Their first argument was that there could not be a comprehensive plan unless it was evidenced in writing separate from the regulation itself. *Id.* The court said a "plan" connoted an integrated product of a rational process and "comprehensive" requires something beyond a "piecemeal approach," which was evidenced by the ordinance considered in relation to the physical facts and purposes as authorized by the New Jersey statute. *Id.* 131 A.2d at 7. The court held the plan did not have to have a separate physical form . . . the "plan may readily be revealed in an end-product – here the zoning ordinance – and no more is required by statute." *Id.* 131 A.2d at 8.

In *Town of Lebanon v. Woods*, 153 Conn. 182, 215 A.2d 112 (1965), Woods, in 1961, bought a tract of land, approximately 400 acres, with the intention of establishing a housing development of 1060 houses built on 1/4 acre lots. At the time he purchased the land, the town was without zoning. *Id.* 215 A.2d at 114. In 1961, Lebanon was almost exclusively residential; there were 750 homes and 9 small commercial or mercantile establishments. *Id.* 215 A.2d at 116. In April, 1962, Lebanon adopted zoning

which required one acre as the minimum lot size throughout the town. *Id.* 215 A.2d at 114. Following the adoption of the ordinance Woods built fourteen homes on lots smaller than an acre. Lebanon received an injunction restraining Woods from furthering his housing development unless he complied with the zoning regulations. Defendant appealed the injunction and Lebanon took a cross appeal. *Id.* 215 A.2d at 114.

Defendant, as one of his points on appeal, asserted the regulations were invalid because they were not adopted with reference to a comprehensive plan as required by law. *Id.* 215 A.2d at 115-116. The court noted the regulations "disclose a comprehensive plan imposing lot area, building placement and minimum living space requirements on all property in the town as a whole except that special and less drastic requirements are made applicable to "seasonal" dwellings. . . . " The type of plan used must "depend in large part on the character of the locality of for which they are designed." *Id.* 215 A.2d at 117. The court held:

> The mere fact that the regulations obviously would have been improved had they contained provisions governing in more detail the future development of the town and protecting the town against the possible indiscriminate intrusion of business, mercantile or industrial enterprises would not, under the circumstances of this particular case, including the rural, sparsely populated, almost wholly residential character of the town and the absence of any threat of such commercial instruction, justify in holding the regulations void. *Id.*

In *Dawson Ent. Inc. v. Blaine County,* 98 Idaho 506, 567 P.2d 1257 (1977), Dawson was an Illinois corporation

doing business in Idaho and is the stockholder of Dawson Ramsey Motor Sales, a General Motor Franchise in Ketchum. Dawson decided its existing location was outmoded and bought the property in dispute, a tract of 12.8 acres, for its new location. The parcel in dispute was a wedge shaped piece of property with the apex of the triangle consisting of Highway 93 on the west which intersected with the Union Pacific railroad right-of-way on the east. The land was zoned for one acre agricultural/residential. Dawson applied for rezoning which was denied. The court held there did not have to be a separate comprehensive plan because "by the adoption of the zoning ordinances and the use of the Blaine County Planning and Zoning objectives, a plan was adopted sufficiently to comply" with Idaho law. *Id.* 567 P.2d at 1261.

In *Osiecki v. Huntington*, 170 A.D.2d 490, 565 N.Y.S.2d 564 (2 Dept.1991) the court held there need not be a separate plan where the plaintiffs challenged the zoning of its land, (approximately five and one-half acres) for residential use. The neighboring properties were not of the same zoning or use. Two parcels to the west were zoned for commercial office buildings and have been used as such; the property to the south and east are zoned residential, but were used for farm and water district purposes by the Town. *Id.* 565 N.Y.S.2d at 565.

Similarly, this court finds that Oakwood acted in conformance with its comprehensive plan because the preamble to the ordinance indicated an intent to create a single residential district with the same boundaries as the incorporated Oakwood; because there was a meeting by the trustees of the village which appointed a zoning

commission to meet and make recommendations regarding regulations. The board met and the notice for a public hearing was given. The commission made its final record at the meeting and recommended the ordinance be enacted. The ordinance was subsequently enacted. The ordinance was comprehensive in scope; setting out the area, height, and use requirements. Since there is evidence that planning was done, and there is no specific requirement that the village pass a separate comprehensive plan as a condition precedent to the passage of zoning ordinances. This court finds that Ordinance No. 10 was both constitutionally and statutorily valid.

This opinion does not stand for the proposition that a municipality, no matter what its size, does not have to adopt a comprehensive plan separate from the zoning ordinance. What was sufficient for Oakwood in this case, an ordinance which provided comprehensive zoning for a single land use, and which evidenced future plans for the community, will not necessarily suffice for all larger towns or cities. *Woods,* 215 A.2d at 117; *Nottingham Village,* 292 A.2d at 688. Without a comprehensive plan, courts in situations such (as the case at bar), will have to determine on an ad hoc basis whether their efforts meet the requirement of creating a "general plan to control and direct the use and development of property in a municipality." Id. 215 A.2d at 116. The summary judgment ruling Ordinance No. 10 invalid is reversed.

Landowners cross-appeal as to their request for attorney's fees is dismissed. The trial judge noted in the judgment, and in a subsequent clarification hearing, that the issue of fees was not being addressed and, therefore,

was still an issue to be decided with the balance of the case.

The judgment is reversed, the cross-appeal is dismissed, and the cause is remanded.

/s/ Harold L. Lowenstein
Harold L. Lowenstein, Judge

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

STATE OF MISSOURI, ex rel., GEORGE A. CHIAVOLA and CONNIE S. FLOTT, et al.,	)	
Relators-Plaintiffs	)	Case No. CV191-4103CC
vs.	)	Division Two
THE VILLAGE OF OAKWOOD,	)	
Respondents-Defendants.	)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND ENTERING DECLARATORY JUDGMENT

Now on this 29th day of July, 1993, the court makes the following findings and orders:

On the 22nd day of July, 1993, the above-numbered cause came on to be heard on Relators-Plaintiffs' (Plaintiffs) Motion for Summary Judgment on Count I and Respondent-Defendants' (Defendants) Motion for Summary Judgment. Plaintiffs appeared in person and by their attorney Robert H. Freilich, and Defendants appeared by their attorney James P. Ralls, Jr.

The Court having fully read and considered Plaintiffs' Motion for Summary Judgment and Suggestions in support thereof as well as Defendants' Suggestions in Opposition to Plaintiffs' Motion and Defendants' Motion for Summary Judgment, having heard and considered the arguments of counsel, and being fully advised in the premises, finds that no genuine issue as to any material fact exists and that Plaintiffs are entitled to summary judgment as a matter of law as to Count I of Plaintiffs' First Amended Petition. The court therefore sustains Plaintiffs' Motion for Summary Judgment as to Count I and grants Partial Summary Judgment on Count I of the

First Amended Petition. All remaining counts of the First Amended Petition and Defendants' Motion for Summary Judgment as it pertains to issues not addressed in this Order remain pending and are unaffected.

As to Count I of Plaintiffs' First Amended Petition, the Court finds, adjudges, declares and decrees that Ordinance No. 10 of the Village of Oakwood, Missouri (the "Zoning Ordinance of the Village of Oakwood") as well as all zoning legislation and zoning regulations adopted pursuant to Ordinance No. 10 are unconstitutional as set forth in Count I of Plaintiffs' First Amended Petition. The Court further holds that Ordinance No. 10 as well as all zoning legislation and regulations adopted pursuant to said Ordinance do not have any supportive plan as required by Chapter 89 RSMo and state law. Accordingly, Ordinance No. 10 as well as all zoning legislation and zoning regulations adopted pursuant to said Ordinance are hereby declared void, invalid and unenforceable.

The Court finds that there is no just reason for delay with respect to entry of the above Order Granting Partial Summary Judgment and Entering Declaratory Judgment; and, pursuant to Supreme Court Rule 74.01(b), the Court determines this Order to be final and appealable with respect to the specific claim hereby adjudicated. This Order is entered and final this 29th day of July, 1993.

/s/ David W. Russell
David W. Russell
Circuit Judge, Division Two
Circuit Court of Clay County

Dated: 7/29/93

Missouri Court of Appeals

October 4, 1994

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE EX REL. CHIAVOLA, GEORGE A., ET AL., APPELLANT - RESP

vs.

VILLAGE OF OAKWOOD, MO., ET AL., RESPONDENT - APPELLANT

WD# 48239

Please be advised that Appellant-Respondent's motion for Rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: Stephen James Moore
James Franklin Ralls

In The Supreme Court of Missouri

No. 77409
W.D. No. 48239

September Session, 1994

State ex rel. George A. Chiavola
and Connie S. Flott,

Respondents,

vs. (TRANSFER)

The Village of Oakwood, Missouri,
et al.,

Appellants.

Now at this day, on consideration of respondents' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1994, and on the 22nd day of November, 1994, in the above-entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 22nd day
of November, 1994.

/s/ Thomas Simon Clerk
_____ D.C.

Supreme Court, U.S.
FILED
MAR 21 1995
OFFICE OF THE CLERK

No. 94-1418

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE SUE FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR, and J. JERRY SHIELDS

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

---

BRIEF IN OPPOSITION

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March 20, 1995

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a village has acted arbitrarily, capriciously or irrationally by enacting a zoning ordinance without first creating a separate document entitled a "comprehensive plan" and thereby violating a landowner's rights under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution; and

2. Whether a zoning ordinance which does not amount to a physical invasion of a landowner's property still can be a violation of the federal substantive due process on the sole ground that a village passed a zoning ordinance without formalizing their planning in a separate document entitled a "comprehensive plan."

LIST OF PARTIES

Petitioners, George A. Chiavola and Connie Sue Flott are individuals who are the landowners of the property in question.

Respondents are the Village of Oakwood, Missouri located in Clay County, Missouri, and the five individual Trustees who were in office at the time the action was first begun: Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr, and J. Jerry Shields.

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No. 94-1418

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE SUE FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR, and J. JERRY SHIELDS

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

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BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, The Village of Oakwood, Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr, and J. Jerry Shields, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, George A. Chiavola and Connie S. Flott.

OPINIONS AND ORDERS BELOW

The Missouri Court of Appeals, Western District, reversed the decision of the of the Circuit Court of Clay County, Missouri which granted Petitioners' Motion for Partial Summary Judgment. The Missouri Court of Appeals decision is reported at 866 S.W.2d 74 and is reproduced in the Appendix to Chiavola and Flott's Petition for Certiorari. (App. A1-19). Clay County Circuit Court Judge Russell found that the zoning ordinance (Ordinance No. 10) of the Village of Oakwood was unconstitutional on its face because it was not adopted pursuant to a separate comprehensive plan. The Circuit Court Order is reproduced in the Appendix to Chiavola and Flott's Petition for Certiorari. (App. A20-21).

Following issuance of the Missouri Court of Appeals Opinion, Chiavola and Flott moved for a rehearing or for a transfer to the Missouri Supreme Court. The Missouri Court of Appeals denied Chiavola and Flott's request. The denial of both motions by the Missouri Court of Appeals is reproduced in the Appendix to Chiavola and Flott's Petition for Certiorari. (App. A22). Thereafter, Chiavola and Flott filed a motion to transfer directly to the Missouri Supreme Court which also was denied. The denial of that motion by the Missouri Supreme Court is reproduced in the Appendix to Chiavola and Flott's Petition for Certiorari. (App. A23).

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioners, Respondents submit the following to this Court:

Village of Oakwood Ordinance No. 10 (excerpts reproduced in Respondents' Appendix).

Missouri Statute § 89.310:

89.310 Municipality may adopt city plan and appoint commission

Any municipality in this state may make, adopt, amend, and carry out a city plan and appoint a planning commission with the powers and duties herein set forth.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Village of Oakwood is one of four small villages grouped together and located in the Kansas City metropolitan area. The Village was and is a small bedroom community around which the cities of Gladstone and Kansas City have grown during the last forty years. All of the 80 lots within the Village have been developed with single family residential homes. The residents of the Village of Oakwood have immediate access to a variety of goods and services at nearby businesses. In 1955, the Village Trustees, who are the elected officials, passed a zoning ordinance (Ordinance No. 10) which platted all of the land as large residential lots and limited the use of that land within the Village to single family residential. While the zoning ordinance has been amended from time to time, the restriction of single family residential has remained.

The Village of Oakwood only employs one person, the Village Clerk. All of the Trustees are elected officials who receive no salary. The Village has no police force or fire department but contracts for those services with neighboring government entities. The Village has, in addition to its trustees, persons elected to serve on the Board of Zoning Adjustment to provide full and complete hearings to residents who wish to raise zoning issues associated with their property.

In 1981, well after the Village was fully developed and the land surrounding the Village had developed to the stage

it is today, Petitioners George Chiavola and Connie Flott purchased a house on six acres fronting on North Oak Trafficway. That home on six acres was one residential lot. Petitioners were fully aware at that time of their purchase the land was zoned single family residential and was part of a small quiet residential village.

In 1988, the Village of Oakwood hired a land planning expert to review the zoning ordinances, land plats and the appropriateness of the land uses within the Village. Mr. Kellenberg, as part of his comprehensive written report, concluded that an appropriate use for the land within the Village and which abuts North Oak Trafficway was to keep all of the land zoned a single family residential. After full consideration of the current circumstances, the wishes of the residents and the expert opinion provided to them, the Trustees chose to continue to keep the use all of the land within the Village as single family residential.

In 1990, Petitioners sought to have their property rezoned commercial for any general commercial use. They filed a petition to have their land rezoned commercial. This petition was given a public hearings before Zoning Commission. Thereafter, Chiavola and Flott sought an appeal of that decision as well as a use variance before the Board of Zoning Adjustment. A public hearing was held for both the appeal and the use variance. At the conclusion of each hearing, and after due deliberation, the respective Village government bodies denied the Petitioners application to rezone, the appeal of application to rezone and the request for a use variance.

II. COURTS BELOW

Petitioners filed a multi-count petition in the Circuit Court of Clay County, Missouri. During the course of the lower court proceeding, both Petitioners and Respondents filed motions for partial summary judgment. In a hearing on both motions for partial summary judgment before the Honorable David Russell, the trial court sustained Petitioners' Motion and found that Ordinance No. 10 was unconstitutional on its face because it was not adopted pursuant to a separate comprehensive plan in accordance with Missouri statutes.[1]

On August 9, 1994, the Missouri Court of Appeals reversed the trial court's judgment that the Village's zoning ordinance was unconstitutional on its face. The Missouri Court of Appeals specifically found that the zoning ordinance of the Village of Oakwood did not violate the substantive due process clauses of the Fourteenth Amendment to the United States and Missouri Constitutions. The Missouri Court of Appeals divided the Constitutional analysis into three categories; the reasonableness of the zoning ordinance, the comprehensive single use zoning and the comprehensive plan. In addition, the Court of Appeals found that the zoning ordinance was not violative of the Missouri Statutes regarding a comprehensive plan.

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[1]Petitioners have attempted to argue that the Village of Oakwood is required by statute to adopt a "city plan" and cites this Court to § 89.340. It should be noted that such statute is not mandatory but discretionary. See § 89.310. The Village of Oakwood has chosen not to adopt a city plan.

Petitioners thereafter sought a Rehearing before the Missouri Court of Appeals or to Transfer to the Missouri Supreme Court. On October 4, 1994, the Missouri Court of Appeals denied both motions. Petitioners filed a separate Motion to Transfer directly with the Missouri Supreme Court. And on November 22, 1994, the Missouri Supreme Court denied the Petitioners' Motion for Transfer.

SUMMARY OF THE ARGUMENT

The Village of Oakwood's zoning ordinance does not violate Petitioners' rights under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. A zoning ordinance which was not adopted pursuant to a separate document entitled a "comprehensive plan" does not make the adoption of the zoning ordinance arbitrary, capricious or irrational.

The nature and extent of rezoning property within a village is essentially a local matter which does not involve the Takings Clause of the Fifth and Fourteenth Amendment to the Constitution. The Village of Oakwood did not pass a zoning ordinance which amounted to a taking; to do so, there must be substantially more intrusion than a simple single family residential zoning restriction. Here, there was no more.

REASONS FOR DENYING THE PETITION

I. A village zoning ordinance limiting land use within the village to single family residential but which was not adopted pursuant to a separate document entitled a "comprehensive plan" does not give rise to a *per se* claim of denial of substantive due process of the Federal Constitution.

The Missouri Court of Appeals held that the zoning ordinance of the Village of Oakwood was not facially unconstitutional. The essence of the Petitioners' claim was that the Village failed to adopt a separate document entitled a "comprehensive plan" before it adopted the zoning ordinances for the Village. Petitioners have wrongfully concluded that because the Village had no separate document setting forth the length and breath of its planning, no planning of any kind was ever accomplished. Such an assumption was addressed by the Court of Appeals[2] and yet the Petitioners still cling to their misguided belief that no planning ever took place by the Village Trustees.

At the time the ordinance was first adopted, the Village of Oakwood drafted a plat laying out the approximate 80 lots with the vision that the entire Village would be filled with single

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[2]Judge Lowenstein found that the Village of Oakwood had a comprehensive plan which was evidenced by the preamble to the ordinance, the appointment of zoning commissions, public hearings, recommendations made and a final record made. *State ex rel. Chiavola v. Village of Oakwood*, *supra* at 94. Substantial planning had been done prior to the enactment of Ordinance No. 10.

family homes. In turn, they drafted and adopted a zoning ordinance which restricted the use of the land to single family lots to assure that the Village would continue to be a bedroom community to the City of Kansas City. Over the years, the zoning ordinances were modified from time to time after consideration by the trustees as to the needs of the residents. In 1988, the Village hired a land planning expert, Richard Kellenberg, to review the zoning ordinances and land usage within and without the Village. Mr. Kellenberg submitted a report to the Village suggesting that an appropriate use for the land fronting on North Oak Trafficway was to maintain it as single family residential. After due deliberation, the Trustees believed that the most beneficial zoning for all residents of the Village was to maintain the zoning as it had been -- single family residential.

Obviously, the planning necessary for a small bedroom village is substantially less than that necessary for a larger urban cities with a wide variety of needs for its residents. The Missouri Court of Appeals strictly limited its decision in this case to the facts with which it was presented. *State ex rel. Chiavola v. Village of Oakwood*, 886 S.W.2d 74 (Mo. App. 1994).

> This opinion does not stand for the proposition that a municipality, no matter what its size, does not have to adopt a comprehensive plan separate from the zoning ordinance. What was sufficient for Oakwood in this case, an ordinance which provided for a single land use, and which evidenced future plans for the

> community, will not necessarily suffice for all larger towns or cities.

Id. at 92. The decision before the state courts does not have the far reaching implications that Petitioners attempt to claim. Here, it was a decision clearly limited on its face to the facts involving a small bedroom community which sought to remain a small residential bedroom community.

Petitioners seek to have this Court review a clearly local zoning issue on the basis that the Village's zoning ordinance, on its face, is arbitrary and unreasonable that it amounts to a taking under the Takings Clause of the Fifth Amendment of the United States Constitution. However, Petitioners' only possible attack on the Village's zoning ordinance was its lack of a separate comprehensive plan. In support of their argument that a zoning ordinance without a separate comprehensive plan violates their substantive due process rights, Petitioners cite the Court to two of its recent decisions, *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992) and *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

In *Lucas*, the owner of beachfront property challenged a South Carolina law which prevented him from erecting any permanent habitable structures on his land. This Court found that if a plaintiff can show that the state's regulation has forced him to sacrifice *all* economically beneficial uses of his property in the name of the common good does result in a taking. However, Justice Scalia was quick to point out that a regulation which did not reduce the landowner's property to zero did not

result in a taking. *Lucas, supra* at 2895 n8. In the case at bar, Petitioners have not and cannot argue that the Village's zoning ordinance which restricts the use of Petitioners' property to single family residential has deprived him of all economically beneficial use of their property. As such, the zoning ordinance of the Village of Oakwood does not remotely amount to a "taking" of Petitioners' property.

Similarly in *Dolan*, the State of Oregon passed a state law which denied the landowner a building permit unless she gave up a portion of her land for the public good. That law required all Oregon cities to adopt new comprehensive land use plans that were consistent with the state-wide planning goals, including storm drainage improvement. The City of Tigard thereafter adopted a comprehensive plan and codified it in its Code. The landowner sought a building permit to expand her business by building new building and parking lot on her land. Commission required that she dedicate the portion of her property lying within the floodplain for improvement of a storm drainage system along the creek and a 15-foot strip for pedestrian pathway. The landowner brought suit claiming the zoning laws amounted to a taking of a portion of her property for which she should be compensated.

This Court found that if the condition of a permit amounts to a total taking of a portion of the landowner's property, the city must prove a reasonable relationship or nexus between the reason for the permit and the use to which the property is being made. In other words, the required dedication must be related both in nature and extent of the

impact of the proposed development. After a review of the city's proffered reasons, this Court found that there was no reasonable relationship between the demands of the city under the permit and the specific floodplain and traffic concerns. *Id.* at 2322.

However, in arriving at that decision, Justice Renquist noted that generally land use regulations do not effect a taking if they substantially advance a legitimate state interest and do not deprive an owner of all economically viable uses of his land. *Id.* at 2316, *quoting, Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). This Court has differentiated between "taking" cases and general zoning cases. Justice Renquist stated in *Dolan* that:

> The sort of land use regulations discussed in the cases just cited[3], however, differ in two relevant particulars from the present [*Dolan*] case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the

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[3]*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 322 (1922); *Agins v. Tiburon, supra.*

> property to the city. In *Nollan, supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions" the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Id. at 2316. The facts of the case at bar have both of the characteristics which form the basis for the distinction by Justice Renquist: 1) the Village of Oakwood's zoning ordinance involves essentially legislative determinations classifying the entire area of the Village, and 2) the zoning ordinance is simply a limitation on the use Petitioners might make of their own property. Thus, this case does not present facts which would arise to the level of a "taking."

Neither the decision in *Lucas* nor the decision in *Dolan* support a finding that when a small village adopted a zoning ordinance without a separate comprehensive plan document that a landowner within that village has suffered a categorical or *per se* violation of his property rights. Nothing in either of those cases would suggest that the Petitioners have been so deprived.

II. There are no conflicting opinions existing between the various federal circuits which would be addressed by granting certiorari of a state appellate court decision which was extremely and narrowly limited to the facts of the zoning ordinance of a small village.

Petitioners have suggested to this Court that the federal circuits are "in hopeless disarray regarding the proper standard to be applied to substantive due process challenges of zoning decisions." By deciding this case, this Court would not address the so-called conflict between the various circuits. Obviously the case at hand is not an appeal from the any of the federal circuit court of appeals decisions. No standard applied by any federal circuit would be addressed by reviewing the decision rendered by the Missouri Court of Appeals in this case.

With relative uniformity, the various federal circuits have addressed the issue of substantive due process as it relates to a legislative act such as a zoning ordinance. The issues raised by Petitioners are not addressed by the present case. First, the case at hand involves a clearly legislative act and not an administrative act.[4] While some of the federal circuits make a distinction between legislative and administrative acts, they do so in the context of **procedural due process** grounds rather than **substantive due process** grounds. *See, e.g., Pearson v. City*

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[4]Contrary to the Petitioners' assertion in their brief, the single family residential zoning was in place in 1981 when they purchased their property within the Village of Oakwood. They have always approached this lawsuit as an application to rezone their property from residential to commercial.

of Grand Blanc, 961 F.2d 1211, 1220 (6th Cir. 1992). Even if one were to suggest that the action in the present case was administrative, the "plaintiff must show that the [village] has been guilty of arbitrary and capricious action in the strict sense, meaning 'that there is no rational basis for the . . . [administrative] decision.'" *Id.* at 1221 *quoting Steven v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981). A single family residential zone for a small bedroom community which has been maintained as such over the years demonstrates a rational basis for the zoning ordinance.

The review of state zoning regulation becomes even narrower where such zoning legislation is under review by a federal court.

> Where *property interests* are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation *if it is rationally related to legitimate state* concerns and does not deprive the owner of economically viable use of his property . . .

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). It is difficult to conceive how the present case can be anything other than the legislative action by the Village of Oakwood in adopting and applying their zoning ordinance. Such zoning affects all of the property within the Village. While the Petitioners argue that the action in denying was not legislative but administrative they do so in an attempt to isolate their

property from the rest of the subdivision by claiming the ordinance affects a relatively small number of persons. Such is not true. The ordinance applies to the entire Village. It is only the Petitioners who do not want that zoning limitation applicable to them. Under Petitioners' argument, every zoning challenge would be administrative since the unwanted effect of the ordinance applies only to that landowner challenging the zoning regulation.

Nevertheless, under either approach, the present case involves a very small village which has zoned all of the property within the village as single family residential. No evil motive or irrational reason has been advanced by the Petitioners for the action by the Board of Trustees in maintaining this zoning over the years. Their only attack is that the zoning ordinance was not adopted and maintained pursuant to a separate comprehensive plan. There is no constitutional requirement that all zoning regulations must be adopted pursuant to a separate comprehensive plan. Further, Petitioners must argue that this failure to have a separate comprehensive plan rises to a level of depriving them of substantive due process. Clearly, this challenge does not even remotely rise to such a level.

There is no conflict in those cases which simply challenge the city's zoning regulations but do not amount to a "taking" of the landowner's property. This Court has set forth the proper standard to be applied in substantive due process claims in zoning cases which do not amount to a "taking." This question was first addressed in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) which upheld a local zoning ordinance which

restricted the commercial development of a landowner's property. Despite the alleged diminution in value of the owner's land, this Court held that the zoning laws were facially constitutional in that they bore a substantial relationship to the public welfare and their enactment inflicted no irreparable injury upon the landowner.

Then, in *Agins v. Tiburon*, 447 U.S. 255 (1980), this Court addressed the landowner's argument the city's zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments to the Constitution. Again, it was held that zoning ordinances which substantially advance legitimate government goals are a proper exercise of the city's police power. One of the governmental purposes which has been recognized by this Court is to protect a municipality's residents from the ill effects of urbanization. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

In the case at bar, the Missouri Court of Appeals found that the zoning ordinance of the Village of Oakwood was a proper exercise of the Village's police power. Judge Lowenstein specifically ruled that the objectives of promoting the health, safety, morals and general welfare of the residents of Gladstone are served by the single-use zoning of its ordinance. *State ex rel. Chiavola v. Village of Oakwood*, *supra* at 82. Thus, no constitutional claim arises simply because a landowner wishes to have his property zoned as commercial rather than residential.

In addition, no evidence exists in this case to support a claim that Petitioners have lost all reasonable value of their property due to the residential zoning which existed at the time they purchased their property. The Petitioners are free to develop their property in accordance with the current zoning restrictions or live in the home which they purchased. Since there has been no diminution in value, there can be no taking.

Assuming for the sake of argument that even if the zoning ordinance of the Village of Oakwood did result in a reduction in the value of Petitioners' property, if the zoning ordinance is a legitimate exercise of the city's police power, then the ordinance will be found to be constitutional. *Village of Belle Terre*, *supra* at 5. It is only where the exercise of that power results in taking all economically viable use of the property that the power may be illegitimate. *See*, *Lucas v. South Carolina Coastal Council*, *supra* at 2898; *Dolan v. City of Tigard*, *supra* at 2315.

III. This case does not present any question of national importance.

As this Court has consistently ruled, zoning regulations are a matter of local concern. The statutes from many of the states are as varied as the land within those states. It is merely wishful thinking by Petitioners that a trend has been established throughout the nation that all cities and villages must adopt a separate comprehensive plan for all zoning regulations. Each state has adopted its own unique statutory requirements which

apply to the cities and villages within that state. Virtually all of the cases cited by Petitioners turn on the particular statutory language of the enabling statutes passed by their respective legislatures.

More importantly, regardless of whether other state courts have required a particular city to adopt their zoning regulations as part of a master plan, these state cases do not address the issue of whether all zoning regulations -- no matter what the enabling statutes require -- must be adopted pursuant to a separate comprehensive plan in order to pass constitutional muster. Petitioners seek to have this Court impose upon the State of Missouri and the other forty-nine states a judicially created requirement that all cities, no matter what size and regardless of their statutory scheme, must adopt a separate comprehensive plan or their zoning regulations will be ruled unconstitutional. Substantive due process was never intended to amount a judicial fiat dictating the nature and extent of the planning in which a given city must engage. The overriding principal first established in *Euclid* is most appropriate here. A court must not set aside the determination of public officers in establishing zoning regulations unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relationship to the public health, morals, safety, or welfare. *Euclid v. Ambler Co.*, supra at 395.

CONCLUSION

The decision of the Missouri Court of Appeals represents a proper ruling of the reasonableness of the zoning ordinances of the Village of Oakwood. Petitioners have wholly failed to establish any basis for granting a writ of certiorari. For the reasons set forth herein, the Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District should be denied.

Respectfully submitted,

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March 20, 1995

APPENDIX-- EXCERPTS OF ORDINANCE NO. 10 THE ZONING ORDINANCE FOR THE VILLAGE OF OAKWOOD, MISSOURI

ORDINANCE NO. 10

AN ORDINANCE TO REGULATE AND RESTRICT IN THE INCORPORATED AREA OF THE VILLAGE OF OAKWOOD THE LOCATION AND USE OF BUILDINGS, STRUCTURES, AND LAND FOR RESIDENCES ONLY: TO REGULATE AND LIMIT THE HEIGHTS OF BUILDINGS HEREINAFTER ERECTED OR ALTERED: TO REGULATE AND DETERMINE THE SIZE AND AREA OF YARDS, COURTS AND OTHER OPEN SPACES: TO REGULATE AND LIMIT THE DENSITY OF POPULATION: TO ESTABLISH A SINGLE RESIDENTIAL DISTRICT WITH THE SAME BOUNDARIES AS THE INCORPORATED VILLAGE: TO PROVIDE FOR ITS INTERPRETATION AND THAT OF OTHER LAWS OR COVENANTS, ETC. RELATING TO THE SAME OR SIMILAR SUBJECTS: TO PROVIDE FOR AMENDMENTS TO THIS ORDINANCE: TO PROVIDE FOR ITS ENFORCEMENT IN PRESCRIBING PENALTIES FOR THE VIOLATION OF ITS PROVISIONS: TO PROVIDE FOR A BOARD OF ADJUSTMENT AND A ZONING COMMISSION AND DEFINING THEIR POWERS AND DUTIES: TO PROVIDE FOR PERMITS: TO PROVIDE THAT IF ANY CAUSE, SENTENCE, SECTION PARAGRAPH OR PART OF THIS ORDINANCE SHALL BE HELD INVALID: SUCH INVALIDITY SHALL NOT

INVALIDATE THE REMAINDER: TO PROVIDE FOR THE REPEAL OF ALL OTHER ORDINANCES OR PARTS OF SUCH ORDINANCES IN CONFLICT WITH THIS ORDINANCE.

WHEREAS, For the purpose of promoting health, safety, morals , and the general welfare of the Village of Oakwood, Clay County, Missouri, the Board of Trustees of said Village wish to secure the benefits of Zoning rules, restrictions and regulations under the authority and provisions of Chapter 89, RSMO 1949, and

WHEREAS: at a meeting of the Board of Trustees of said Village, held on January 31, 1955, said Board of Trustees appointed a Zoning Commission, composed of the following named persons: Dr. F. VonBohland, Russell Carpenter, William Woods, L.P. (John) Munger, and L.W. Parrish to meet and recommend the boundaries of the various original districts and appropriate regulations to be enforced therein, and

WHEREAS, said Zoning Commission, at a meeting held on February 4, 1955, in said Village, considered a zoning ordinance proposed to be enacted, and made its preliminary Report to the Board of Trustees that same be enacted, and said Zoning Commission ordered that a public hearing be held before said Zoning Commission on February 28, 1955, and that fifteen (15) days notice be given thereof by publications of said notice in the North Kansas City (Mo.) Press-dispatch, and

WHEREAS, said notice was duly published on February 10, 1955, (the affidavit of which is attached to this page of this Ordinance) and said meeting was duly held on February 28, 1955, at which meeting said Zoning Commission did consider said proposed ordinance and hear all who appeared in relation thereto, and

WHEREAS, said Zoning Commission did submit its final report thereon, and recommended to the Board of Trustees that said proposed ordinance be enacted, and

WHEREAS, said Board of Trustees, at the meeting held on March 8, 1955, received said final report from said Zoning Commission and ordered a public hearing to beheld before the said Board of Trustees, on March 28, 1955, and that fifteen (15) days notice be given thereof by publication of said notice in the North Kansas City (Mo.) Press-Dispatch, and

WHEREAS, the proofs of notices aforesaid and the reports of said Zoning Commission have been filed with the Village Clerk as public records, and

WHEREAS, all preliminary proceedings necessary to the passage of such Ordinance have been complied with and strictly followed,

NOW THEREFORE BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF OAKWOOD AS FOLLOWS:

Section 1. SHORT TITLE. This ordinance shall be known and may be cited as the Zoning Ordinance of the Village of Oakwood.

Section 2. RESIDENTIAL DISTRICT. For the purpose of regulating and restricting the use of land and the erection, construction, reconstruction, alteration, repair, relocation, or maintenance of buildings or structures and use of land and lots, the incorporated territory of the Village of Oakwood, Missouri, is hereby established and declared to be one residential district.

Section 3. DISTRICT BOUNDARIES. The boundaries of the district are hereby established and are hereby designated as the existing boundaries of the Village of Oakwood as described in detail in the incorporation of said Village, and are hereby made as much a part of this Ordinance as if the same were set forth in full herein. It shall be the duty of the Zoning Commission to keep on file in its office an authentic copy of all maps, and all changes, amendments, or additions thereto.

Section 4. BOARD OF ADJUSTMENT. A Board of Adjustment is hereby established in accordance with the provisions of the Zoning Act and shall have such supervisory and appellate powers as made and provided.

BYLAW: The word "Board" when used in this Ordinance shall be construed to mean the "Board of Adjustment," and the work "Trustees" when used in this Ordinance shall be

construed to mean the "Board of Trustees." The Board shall be appointed by the Trustees and shall consist of five (5) freeholders. The membership of the first Board appointed shall serve respectively: one (1) for one (1) year, one (1) for two (2) years, and (1) for three (3) years, one (1) for four (4) years and one (1) for five (5) years each. Members shall be removable for cause by the Trustees upon written charges and after pubic hearings. Vacancies shall be filled by the Trustees for the unexpired term of any members whose term becomes vacant. The Board shall elect its own chairman, and shall adopt rules of procedure consistent with the provisions of this Ordinance and the Zoning Act.

* * * * *

Section 7. USE REGULATIONS. No building, structure, land or premises shall be used, and not building or structure shall be hereinafter erected, reconstructed, or altered, except for one or more of the following uses:

1. Dwellings, one family.
2. Churches and community buildings.
3. Public parks, playgrounds and public recreation buildings.
4. The use of buildings or premises for such public utility services are as authorized or ordered by the Public Service Commission or by permit of the County Court, and excluded from jurisdiction of the Zoning Commission by the Zoning Act.

5. Accessory uses, customarily incident to the above uses and located on the same lot therein, not involving the conduct of a business or industry.

* * * * *

Section 19. EFFECT: This Ordinance shall take effect from and after its passage, and notice of said ordinance shall be given by publishing the same in the North Kansas City News-Dispatch (Mo.) a newspaper of general circulation in this Village, in the issue thereof dated April 4, 1955.

Passed this 28th day of March, 1955.

Supreme Court, U.S.
FILED
MAR 20 1995
CLERK

No. 94-1418

(3)

In The

Supreme Court of the United States

October Term 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE S. FLOTT,

Petitioners,

v.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR and J. JERRY SHIELDS,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

MOTION OF THE AMERICAN PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

MOTION OF THE AMERICAN PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Planning Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner's writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of the American Planning Association arises from its basic organizational purpose which is to foster and encourage the use of sound comprehensive land use planning principles by governmental bodies.

As the nation's largest non-profit association of 28,000 professional urban and regional planners, appointed and elected lay planning officials and other interested citizens, the American Planning Association (APA) monitors planning practices throughout the United States. APA promotes the use of sound, rational and non-discriminatory zoning and planning practices through its Planning Advisory Service (PAS) inquiry answering service, reports and memos; its magazines, newsletters, conferences, continuing education workshops, and its participation as an *amicus curiae* before state and federal courts.

APA has long furnished an expert and balanced perspective on the relationship or nexus between planning and zoning. It has produced several PAS Reports and Memos on this topic as well as many articles, workshops and conference sessions. The nexus between zoning and planning is one of the most frequent and long-standing inquiries local governments have submitted to APA's PAS inquiry answering service. APA has consistently taken the position that a comprehensive planning process is an indispensable precursor to the adoption of a zoning ordinance.

In the instant case in the Missouri Court of Appeals, Western District, respondents argued that a local governmental unit could impose a land use regulatory scheme initially adopted forty years ago without engaging in any planning whatsoever. It concluded that the zoning ordinance bore a substantial relationship to public health, safety, morals or general welfare and thus did not violate the substantive due process rights of the landowners notwithstanding the total absence of any plan, planning process or procedure. The American Planning Association believes that the constitutional issue inherent in the planning/zoning relationship will impact communities

nationwide should the Missouri Court of Appeals' decision be allowed to stand. The national community of state, city and county planners and planning officials will be affected by this decision. Because of the importance of the holding and the American Planning Association's unique status as the major professional organization representing the interests of planners and state and regional local governmental planning departments and commissions, it is believed that the brief which *amicus curiae* is requesting permission to file will show the vital national importance of this constitutional issue.

Respectfully submitted,

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Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the United States Constitution, amendment XIV, requires that before a local governmental body may impose a restrictive zoning ordinance on property owners it must engage in some type of planning process or procedure that creates the rational basis necessary to avoid an arbitrary, capricious and unreasonable exercise of the police power.

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The American Planning Association respectfully submits this brief in support of the Petitioner's petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District is reported at 886 S.W.2d 74 (1994). The Missouri Court of Appeals, Western District denied Petitioner's Motion for Rehearing and Motion for Transfer to the Supreme Court of Missouri on October 4, 1994. The Missouri Supreme Court denied Petitioners' application for transfer on December 22, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in relevant part:

U.S. Const. amend. XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Village exercises its power to zone pursuant to, in part, Mo.Rev.Stat. § 89.040:

> 89.040. Purposes of regulations
>
> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

INTEREST OF THE AMICUS CURIAE

Without repeating the material contained in the Motion for Leave to File Brief Amicus Curiae, the American Planning Association (APA) respectfully submits that it has a vital interest in the outcome of the petitioner's petition for a writ of certiorari. It is the leading national professional organization whose members are on the front line of planning and zoning throughout the United States. It is also a unique organization in that its members include not only professional planners, both private and public, but lay appointed and elected individuals who

serve on thousands of state, regional and local governmental organizations which develop, implement and enforce land use regulatory programs throughout the United States. The APA, through its Amicus Curiae Committee, carefully considers which cases are important enough to its members to merit an amicus curiae brief. A primary APA objective, which is threatened by the Missouri Court of Appeals decision, is to foster sound state, regional and local governmental planning efforts and to tie those planning efforts to the unit's land use regulatory mechanisms.

REASONS FOR GRANTING THE PETITION

Property owners in the United States have a constitutional right protected by the 14th Amendment from having their property interests subjected to police power regulations that are not "shown to have any 'substantial relation to the public health, safety, morals or general welfare . . . ' " *Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J. concurring). The exact parameters of that constitutional protection are hard to define. But in a similar facial constitutional attack on a zoning ordinance, this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), distinctly recognized that if the property owner could prove that the zoning ordinance was "clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals, or general

welfare," *Id.* at 395, a substantive due process claim would be proven.[1]

I. The Missouri Court of Appeals decision by totally divorcing the zoning and planning processes condones a violation of the Petitioners' substantive due process rights to own property interests free of arbitrary, capricious, and unreasonable exercises of the police power.

Beginning with this Court's initial validation of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926), followed by the widespread adoption of the Standard Zoning Enabling Act's language requiring that zoning be "in accordance with a comprehensive plan," and continuing through more recent Supreme Court land use decisions, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the notion that a property owner's substantive due process rights are violated when a state, regional or local governmental unit exercises its land use powers in an irrational or arbitrary manner has been widely accepted. See also, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th

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[1] Judge Posner has called the substantive due process principle "a tenacious but embattled concept." *Conniston Corp. v. Village of Hoffman Estates*, 844 F.2d. 461, 465 (7th Cir. 1988). Nonetheless, he applied the principle in a challenge to a land use decision because, among other reasons, this Court had done so in the landmark zoning decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Cir. 1989); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

The exercise of the zoning power without evidence of any planning or forethought is arbitrary. Planning and zoning, in other words are inextricably linked. The New York Court of Appeals recognized the importance of the relationship between planning and zoning that was incorporated into the "in accordance with the comprehensive plan" language that was part of the Department of Commerce's Standard Zoning Enabling Act (SZEA). The SZEA became the benchmark for state enabling legislation throughout the United States and with some minor amendments is still very evident in the Missouri statute at issue here. Mo.Rev.Stat. § 89.040. The SZEA language requiring the zoning ordinance to be in accordance with the comprehensive plan is the statutory recognition of the substantive due process principle that a property owner has a right to be free of arbitrary exercises of the police power. The New York court concluded:

> Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> This fundamental conception of zoning has been present from its inception. The universal statutory requirement that zoning conform to a 'well-considered plan' or 'comprehensive plan' is a reflection of that view. . . . The thought behind the requirement is that consideration must be

> given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.

Udell v. Haas, 235 N.E.2d 897, 900 (N.Y.Ct.App. 1968) (citations omitted).

The record in this case indicates that the Village of Oakwood, Missouri adopted Ordinance No. 10 in March 1955 (which incorporated without change a 1930's subdivision plat). The ordinance, with only minor non-substantive changes, has remained in effect since that date. The effect of the ordinance is to restrict all 80 lots located within the Village to exclusive large lot single-family residential use with a minimum lot size of 30,000 square feet. The Village has never adopted a comprehensive plan nor engaged in any "calm and deliberate" consideration of the alternatives in any plan or planning process. Professional planners are not necessary, but planning is. There ought to be a process that reflects forethought. The size and location of the local governmental entity will dictate what is needed in a given case, but a government ought to "think before it acts."

The Standard Zoning Enabling Act language requiring that zoning be "in accordance with a comprehensive plan" was perceived by a Delaware court to "derive[s] in part at least from the constitutional obligation that the police power not be exercised arbitrarily." *Green v. County Council of Sussex County*, 508 A.2d 882, 889 (Del.Ch. 1986), aff'd, 516 A.2d 480 (Del. 1986). It is the planning process

which provides the necessary safeguards against arbitrary and irrational police power actions that deprive a person of his or her substantive due process rights.

Historically the recognition that the planning provision of the Standard Zoning Enabling Act language reflects a constitutional imperative has been slow in coming. Interpretation in the state courts of the statutory planning requirements to validate zoning has reflected changing judicial attitudes toward land use regulation, which have become increasingly recognized during recent decades. The 1950s, when zoning law was still fairly new, was a period of maximum judicial respect for unplanned municipal autonomy and home rule; the state courts, led by New Jersey and California, made a conscious decision to give local governments great freedom in guiding their own future.[2] Under this philosophy, it was perhaps natural to downplay any requirement that zoning must be in accordance with a plan or result from a planning process. Courts were simply unwilling to overturn local zoning efforts even though they were totally unsupported by separate plans or planning processes.[3]

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[2] *See Kozesnik v. Montgomery Twp.*, 131 A.2d 1 (N.J. 1957); *Vickers v. Township Committee of Gloucester Twp.*, 181 A.2d 129, 140 (1962), *app. dism'd*, 371 U.S. 233 (1963), *both overruled, Southern Burlington N.A.A.C.P v. Township of Mount Laurel*, 456 A.2d 390 (1983); *O'Loane v. O'Rourke*, 42 Cal.Rptr. 285 (Cal.App. 1965). See generally, 1 Norman Williams, American Land Planning Law 104-15 (1988).

[3] It is this outmoded 1955 New Jersey decision. *Kozesnik, supra*, overruled in the *Mount Laurel* case which the Missouri Court of Appeals placed its greatest reliance upon as expressing the current constitutional requirements for land use regulations.

While there were many interpretations of the SZEA's requirement of "in accordance with the comprehensive plan," the most common interpretation in the state courts in effect read the requirement out of the Act, by holding that the required plan could be found in the zoning ordinance, if one only looked hard enough.[4]

However, the years since 1970 have seen a striking change in judicial attitudes toward land use regulation. As the 1960s proceeded, it became more evident that even well-meaning local governments were misusing the freedom granted by the courts; their decisions were sometimes arbitrary as to property owners, often exclusionary as to large groups in the local and regional population, and many times just plain non-sensical. As a result, in recent years there has been a marked change toward a more activist judicial review in the state courts; now the courts know what is going on – if there is a valid explanation usually supported by a comprehensive plan or planning process, the regulation is upheld.[5] As one noted land use lawyer has stated:

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[4] The resulting interpretation was in fact rather silly - that the zoning ordinance must be in accordance with itself. As one New York court stated: "This court cannot believe that the Legislature intended to contemplate such a meaningless interpretation of these provisions." *Levine v. Oyster Bay*, 259 N.Y.S.2d 247, 254 (Sup.Ct.), *aff'd*, 283 N.Y.S.2d 171 (2d Dept. 1966). Nonetheless this was the most common interpretation in the pre-1970 state law.

[5] *See, e.g., Levitz v. State*, 613 P.2d 1259 (Ariz. 1980); *Haines v. City of Phoenix*, 727 P.2d 339, 344 (Ariz.App. 1986); *First Hartford Realty Corp. v. Planning & Zoning Comm'n of Bloomfield*, 338 A.2d 490 (Conn. 1973); *East Lands, Inc. v. Floyd County*, 262 S.E.2d 51

> Planning and comprehensive plans provide substantive integrity to land use regulations: 'If American land use controls are to work effectively and fairly, they must be based upon (a) an overall understanding of the needs for land in the community, and (b) a sense of direction – that is to say, upon planning . . . '

Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 Stetson L.Rev. 603, 626-27 (1987). Post hoc rationalizations should not be the basis for a zoning ordinance. Judicial review of zoning decisions would be made much easier if the zoning ordinance was based on a comprehensive planning process, rather than the ad hoc and post hoc rationalizations, that are typified by the Village's position in this case.

This Court in its recent land use cases, *Nolan v. California Coastal Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), and *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), has developed principles which are equally applicable in the substantive due process arena. *Dolan* and *Lucas* embody the principle that the government must tell property owners why they are being regulated. In *Nollan*, the

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(Ga. 1979); *Palatine National Bank v. Village of Barrington*, 532 N.E.2d 955 (Ill.App. 1988); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984); *Nova Horizon, Inc. v. City Council*, 769 P.2d 721 (Nev. 1989); *Mahaffey v. Forsyth County*, 394 S.E.2d 203 (N.C.App.), *review dism'd*, 399 S.E.2d 327 (N.C. 1990), *aff'd*, 401 S.E.2d 365 (N.C. 1991); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex.App. 1989), *cert. denied*, 498 U.S. 1087 (1990).

Court invalidated a regulatory land use dedication which lacked a rational nexus in failing to advance a legitimate state interest. Similarly in *Lucas*, the state's reasons for preventing construction on the beachfront lot were found inadequate where a total economic loss ensued. It was not clear why Lucas could not build on his lots when his neighbors had built on theirs. In *Dolan*, the city's reasons for demanding a bike path and a greenway easement were likewise insufficient. The city had to show that the property owner's proposed actions justified its demands.

Though the explanations for the exercise of the police power in *Dolan* and *Lucas* were insufficient, they are significantly more than provided here, where the Village has restricted land use without any effort to tell property owners why they are being limited in what they can do. The mere enactment of a zoning ordinance is an insufficient explanation.

This Court has also warned that express statements made by local governmental units to justify a mandatory dedication of land in exchange for a land use permit might not be sufficient without appropriate study of planning to sustain the local government's burden of proof to show the 'rough proportionality' constitutionally required before such a dedication may be imposed. *Dolan*, 114 S.Ct. at 2321-22. Requiring the City of Tigard to quantify its findings in support of its mandatory dedication requirements cannot compare with the record in this case which shows a total absence of any municipal planning efforts or findings regarding the initial adoption and continued application of its zoning ordinance. The Missouri Court of Appeals simply inferred or "divined" a municipal purpose. There appears to be no evidence in

the record to support the continued application of a forty year old single use zoning ordinance adopted without support of a plan or a planning process when there has been a substantial change in the physical environs of the Village, and the record shows that not one residential building permit has been granted for over 12 years for miles along the exclusively commercial thoroughfare.

There are numerous factors which a planning process would have analyzed in dealing with the petitioner's request to rezone which were ignored by the Village. There is no evidence in the record to show that the Village looked at the experience of other local governments in the Kansas City metropolitan area, or nationally, in dealing with residential zoning that abuts major commercial highways. The Village did not determine what, if any, was the extent of depreciation of the property values of the residentially-zoned lands now adjoining this major thoroughfare. Likewise, nothing in the record shows that the Village considered any special need for housing in the area abutting the highway in the context of metropolitan travel-to-work patterns. Planning would also analyze the needs in light of the surrounding commercial development and the incompatibility of single family residential development along a major highway.[6]

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[6] The renowned Judge Hall of the New Jersey Supreme Court noted the complexities involved in zoning lands adjacent to highways in *Wilson v. Borough of Mountainside,* 201 A.2d 540 (N.J. 1964). In discussing a zoning ordinance that zoned land for residential use along a major thoroughfare Judge Hall concluded in light of the requirement that the zoning be in accordance with a comprehensive plan that: "It [the blanket residential zoning district] is the antithesis of the statutory

The facts in this case show the need to tie the zoning ordinance to a plan or planning process. The now forty year old restrictive large lot zoning ordinance restricts the petitioners' parcel to single family residential use. The parcel now abuts a six lane highway which carries upwards of 25,000 cars per day. Land abutting that highway outside of the Village limits, but adjacent to the parcel owned by the petitioners, has been devoted to commercial uses including an automobile muffler shop, an automobile parts store, gasoline service stations, a large automobile dealership and several office buildings. A decision to restrict the use of petitioners' land to residential purposes without any supporting planning process, taking into consideration the present and future conditions of the area in which the property is located, is a deprivation of their property rights without due process of law.

II. The Question Presented is Important

The relationship between planning and zoning is the cornerstone of the public right to regulate land use for the protection of the public health, safety and general welfare. The American Planning Association fosters a close relationship between the planning process and the zoning process. Only through that nexus can private

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requirement (SZEA) to impose blanket use restrictions without regard to the character of the district and use suitability . . . " 201 A.2d at 548. He further added that even where a zoning district was in accordance with a comprehensive plan, the plan must not be a capricious one which is realistically unreasonable. *Id.* at 552.

landowners be assured that the governmental entity is acting in a reasonable and non-arbitrary manner. The Missouri Court of Appeals decision, if allowed to stand, will have a deleterious national impact by discouraging planning efforts and encouraging the imposition of arbitrary zoning regulations.

Property owners have a right to be free of arbitrary governmental zoning regulation. Before zoning regulations are imposed that diminish the value of property owners in the community, planning must occur. The drafters of the Standard Zoning Enabling Act envisioned that zoning ordinances would be adopted "in accordance with a comprehensive plan." The APA believes that zoning without any planning process leads to results such as we have here where a zoning ordinance, in effect for over forty years without significant change, arbitrarily restricts the use of petitioners' land. The issue of zoning land abutting major highways for residential use arises throughout the United States. There are no simple answers to the many questions involved in that type of zoning restriction, but it is clear that some type of planning effort must be utilized because of the many complex factors involved. Zoning without planning should be treated as a *per se* violation of a property owner's due process right to be free of arbitrary, capricious and irrational zoning regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 94-1418

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE SUE FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR, and J. JERRY SHIELDS

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE BRIEF AMICUS CURAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT:

The Respondents, The Village of Oakwood, Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr, and J. Jerry Shields, respectfully request that this Court

deny the Motion of the American Planning Association for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of the Petition for Writ of Certiorari submitted by Petitioners, George A. Chiavola and Connie S. Flott.

OBJECTION TO REQUEST FOR LEAVE

The American Planning Association has sought leave to file a Brief Amicus Curiae in the above captioned case. In accordance with Supreme Court Rule, counsel for the American Planning Association sought the consent of the attorneys for the Respondents for the request to file an Amicus Curiae Brief in Support of the Petition for Certiorari filed by the Petitioners. Counsel correctly notes that the consent of Respondents was not given.

Respondents did not give consent to the American Planning Association for a number of reasons: 1) the Petition for Writ of Certiorari has not been granted; 2) the present fact situation upon which the Petition for Writ of Certiorari is based is not nor could it be a case of national importance; 3) the request to file a Brief Amicus Curiae is base upon a faulty assumption, i.e., that no planning of any kind has been undertaken by the Village for the past forty years; and 4) there has been no attempt to show why or how the Petitioners are not in a position to adequately present the facts or questions of law.

Rule 36 of the United States Supreme Court Rules sets forth in subsection .1 the circumstances under which a third party may file a brief of an amicus curiae **prior** to consideration of the jurisdictional statement or **of the petition for writ of certiorari**. Such a brief should only be filed when it is accompanied by a written consent of the **parties** and within the time which is allowed for the filing of a motion to dismiss or affirm or the brief in opposition to the petition for certiorari. Rule 36.1 specifically states that "[a] motion for leave to file such a brief [amicus curiae] when consent has been refused **is not favored**." (Emphasis added).

In the instant case, the American Planning Association has been refused the consent of Respondents. Yet despite that refusal and the language of Rule 36.1, the American Planning Association has filed a motion for leave to file a brief amicus curiae.

The filing of the Motion for Leave by the American Planning Association becomes even more curious when one examines its reasons for asking permission to file a Brief Amicus Curiae. The American Planning Association makes a factual assumption which is not true. In its Motion, the American Planning Association states that Missouri Court of Appeals, Western District concluded that the Village of Oakwood's zoning ordinance "did not violate the substantive due process rights of the landowners **notwithstanding the total absence of any plan, planning process or procedure**." In the same manner in which the Petitioners improperly interpreted the Missouri Court of Appeals' decision, the

American Planning Association also mischaracterizes that opinion. At no time in the opinion written by Judge Lowenstein is there a statement, express or implied, that a municipality may pass or maintain zoning legislation without any planning for the land within the municipality. The issue before the Missouri Court of Appeals was whether a small village, the size of a small subdivision, was required to adopt a separate written "comprehensive plan" and then pass all of its zoning ordinances pursuant to that "comprehensive plan." The Missouri Court of Appeals found that a village's zoning ordinance did not violate a landowners' constitutional substantive due process rights by not first adopting a separate written "comprehensive plan." In addition, the Court of Appeals found that the Village did have a comprehensive plan which was evidenced by the preamble to the Village's zoning ordinance. Other evidence of the comprehensive plan by the Board of Trustees, the Court of Appeals noted, can be found in their appointment of zoning commissions, holding public hearings, entertaining recommendations and making a final record.

The Missouri Court of Appeals not only limited its decision to the issue of a separate "comprehensive plan", but it also limited its opinion to the facts before it; i.e., a small residential village. On page 18 of the opinion, the Court noted:

> This opinion does not stand for the proposition that a municipality, no matter what its size, does not have to adopt a comprehensive plan

> separate from the zoning ordinance. What was sufficient for Oakwood in this case, an ordinance which provided for a single land use, and which evidenced future plans for the community, will not necessarily suffice for all larger towns or cities.

Id. at 18. Thus, this case, contrary to the assertion by the American Planning Association, will not affect state, city and county planners throughout the country. The decision will have no application to other cities with the exception of small residential bedroom villages in states with zoning legislation that is substantially similar to the State of Missouri.

Finally, the proposed Brief Amicus Curiae included with the American Planning Association's Motion for Leave is nothing more than a restatement of the Petitioners' Brief contained in their Petition for Writ of Certiorari. Throughout its Brief, the American Planning Association equates the lack of a separate written "comprehensive plan" with no planning of any kind. The opinion of the Missouri Court of Appeals directly contradicts such an assumption. That decision notes that the Trustees of Oakwood did go through a planning process from the beginning as noted above. In addition, during the last forty years, the Board of Trustees has considered the needs of the Village and its residents in the amendments that have added from time to time to the main zoning ordinances. The Village also employed a land planner to review the zoning ordinances as to both their current effect and possible future considerations on the land within the Village. The land planner advised the

Village that it would be proper to continue its current single family residential zoning for all of the eighty lots within the Village.

CONCLUSION

The Village of Oakwood requests that this Court deny the Motion for Leave to File Brief Amicus Curiae filed by the American Planning Association for the reasons set forth herein. Alternatively, if this Court grants such leave to the American Planning Association, Respondents pray that this Court should deny the Petition for Writ of Certiorari filed by the Petitioners in that they have wholly failed to establish any basis for granting a writ of certiorari.

Respectfully submitted,

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Respondents.

On Petition For Writ Of Certiorari
To The Missouri Court Of Appeals, Western District

REPLY BRIEF OF PETITIONER

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On Petition For Writ Of Certiorari
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REPLY BRIEF OF PETITIONER

ARGUMENT

I. PETITIONER PROPERLY PRESERVED THE FEDERAL CONSTITUTIONAL ISSUE OF SUBSTANTIVE DUE PROCESS ON APPEAL TO THE HIGHEST STATE COURT, AN ISSUE IN WHICH THE FEDERAL CIRCUIT COURTS OF APPEAL ARE IN GREAT CONFLICT, AND WHICH WILL BE RESOLVED BY A GRANT OF CERTIORARI IN THIS CASE.

The federal circuit courts of appeal are in irreconcilable conflict regarding the proper standard of review to apply to federal substantive due process challenges of

local zoning decisions. *Pearson v. Town of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). It is unlikely that this conflict can be resolved by the federal circuits, and can only be resolved by this Court. This Court's resolution of the conflict is likely to have great future consequences for property owners and local governments concerning challenges to local zoning decisions based upon either substantive due process or "taking without just compensation" arguments.

Respondent asserts that this issue may not be reviewed by a grant of certiorari. In this case, the Petitioners properly preserved a facial challenge of the Village of Oakwood's planless zoning ordinance on both federal and state substantive due process grounds. State substantive due process, however, was the only constitutional issue discussed by the court below. *State ex rel. Chiavola v. Village of Oakwood*, Petition Appendix (Pet. App.) at A5. It is well established that state court remedies must be sought before filing a claim in federal court which challenges local zoning decisions, because *federal courts* are loathe to become super zoning agencies. *See Nestor Colon Medina Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *Amsden v. Moran*, 904 F.2d 743 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991). This case is coming to the Court through the standard procedural posture of certiorari from a decision of the highest state court. The only way to resolve Petitioners' federal substantive due process claim is through this Court's *certiorari* review, which will necessarily involve the federal circuit courts of appeal standards applied to substantive due process challenges of local zoning decisions.

Respondents misunderstand the analogies made to this Court's analysis of takings challenges under the Fifth and Fourteenth Amendments. *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886 (1992), stands for the proposition that this Court is prepared to create *per se* categories for constitutional violations of property rights. *Dolan v. Tigard*, 114 S.Ct. 2309 (1994), demonstrates this Court's emphasis on land use planning and proper planning studies and findings as a valid and necessary prerequisite to municipal zoning regulations. Petitioners do not raise at this time and on this appeal the "as applied" takings issues, which are reserved for trial, although the taking issue is inextricably linked with any discussion of substantive due process challenges of local zoning decisions.[1]

II. TO AVOID ARBITRARY, CAPRICIOUS AND IRRATIONAL ZONING ACTION IN VIOLATION OF FEDERAL SUBSTANTIVE DUE PROCESS, THE VILLAGE OF OAKWOOD MUST CONDUCT SOME MINIMAL AMOUNT OF PLANNING TO GUIDE ITS ZONING DECISIONS, BUT NOT NECESSARILY CREATE A SEPARATE COMPREHENSIVE PLAN.

Respondent would have this Court believe that the only issue on appeal is whether a municipality is required to create a *separate* comprehensive plan. The legislature of

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[1] For example, Justice Stevens argues that the *Dolan* decision became unavoidably tangled with substantive due process analysis when the majority invalidated the City of Tigard's dedication requirement for issuing a building permit. *Dolan*, 112 S.Ct. at 2329 (Stevens, J., dissenting).

every state in the union has declared that there must be some form of comprehensive planning *process* to inform the judgment of a municipality in its zoning actions, regardless of whether that process is summarized in a separate document labeled the "comprehensive plan." Notes accompanying the Standard State Zoning Enabling Act of 1926 state that "the draftsmen intended to require some planning as an integral part of the zoning process." Pet. App. at A12. The Missouri legislature has declared that all municipalities must conduct comprehensive planning prior to enforcing its zoning ordinance, and this requirement is not optional, despite Respondents' assertion to the contrary.[2]

It is patently arbitrary and irrational for the Village to decide in 1955 that it should permanently restrict all property to single-family residential uses, following a private subdivision plat recorded in 1928.[3] The actions of

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[2] All references to the adoption of a "city plan" by a municipal zoning or planning commission in Missouri are couched in language designating mandatory requirements. "The [zoning or planning] commission *shall make and adopt* a city plan for the physical development of the municipality." MO.REV.STAT. § 89.340 (1994). "In preparation of the city plan, the commission *shall* make careful and comprehensive surveys and studies of the existing conditions and probable future growth of the municipality." *Id.* § 89.350 (emphasis added).

[3] The subdivision plat recorded in 1928 is reproduced in the appendix to this Brief at A1. The Village has represented that this is the only mapping document that accompanied the Village Trustees' decision to zone the entire Village as exclusively large-lot single-family residential uses. This map also represents the approximate configuration of the Village as it exists today. The large rectangle in the northwest corner of the Village, labeled "BLK 10", less the northeast corner, is owned by Chiavola and

the Village to enforce Ordinance No.10 over the past 40 years is by definition arbitrary, as the Village Trustees have no basis upon which to conclude that the residential lots are the only appropriate land uses for the Village without study and planning to support the rationality of that analysis. The Village Trustees and the Village Clerk admitted in the request for admissions and in deposition that the Village has conducted *no planning* and has legislatively adopted *no comprehensive plan*. These admissions are included in the trial court's official record, and served as the basis for the trial court to grant summary judgment on the facial unconstitutionality of Ordinance No.10.

III. GROSS FACTUAL INACCURACIES ARE RECITED BY RESPONDENTS IN THEIR BRIEF IN OPPOSITION, WHICH ARE HIGHLY MISLEADING TO THIS COURT.

The Village of Oakwood has conducted absolutely no planning in either the enactment or enforcement of its single zoning ordinance which limits all property in the Village to large-lot, single-family residential usage. When Ordinance No.10 was adopted in 1955, the Village Trustees decided that the Village should forever be limited to large-lot single-family residential land uses. The sole document informing the decision of the Village was a plat drafted in 1928 by a *developer* who initially created

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Flott, and the street along the western border of the Village is currently North Oak Trafficway. This document was recorded by a developer approximately 25 years before the Village was incorporated.

the subdivision which eventually became the Village. App., *infra*, A1.

In response to the first rezoning application submitted by Petitioners in 1988, the Village retained Richard Kellenberg to review the options available to the Village in response to the rezoning request including whether the Village should conduct planning. Kellenberg did not engage in any of the comprehensive planning processes that are required by Missouri statute. Kellenberg's short (six page) report on whether the Village should do a planning study did *not* suggest that the most appropriate response was to maintain the Village as exclusively single-family residential land uses. Kellenberg provided the Village with four possible land use studies, three of which would study whether all property fronting North Oak Trafficway, including Petitioners' property, should be rezoned to allow commercial usage to comport with the highly commercialized nature of North Oak.

Kellenberg was mindful that the one study option which continued to limit all land to residential uses *must be done with additional and "careful planning," so that this option "can be worked out without depriving anyone of property rights or values."* (Trial Exhibit P-2, at p. 5) The Village never heeded Kellenberg's warning to conduct planning or studies to protect property rights and values. The Village has taken no legislative action to study or plan any of Kellenberg's study options, and has not adopted a plan or conducted any studies to adequately determine if the Village should permit commercial land uses within the Village. The trial court rejected the Village contention that it had done planning on the basis of the Village's own admissions.

Respondents would also have this Court believe, and repeatedly emphasize, that Oakwood is a "small bedroom community". Petitioners' property is a six-acre parcel of land on one of the largest and most highly commercialized transportation corridors in the Kansas City Metropolitan Region. What the Village Trustees may have envisioned in 1955 as the ideal setting for their homes does not comport with the present nature of the Village. Over 25,000 motor vehicles pass by Petitioners' property on the western border of the Village each day. Directly across the road from Petitioners' property are numerous highly visual commercial uses, including several automobile dealerships, gasoline service stations, automobile and motorcycle repair shops, restaurants, fast-food establishments, and professional office buildings.

Respondents' efforts to mischaracterize Kellenberg's document as a comprehensive planning study, and continual mischaracterization of the Village as entirely residential in nature, underscores the Village's failure to conduct any comprehensive planning or conduct even minimal studies to adapt the Village to the highly commercialized traffic corridor which serves as the western border of the Village.

CONCLUSION

For all of the reasons stated in the Petition and this Reply, a Writ for Certiorari to the Missouri Court of Appeals, Western District, should be issued.

Respectfully submitted,

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April 5, 1995

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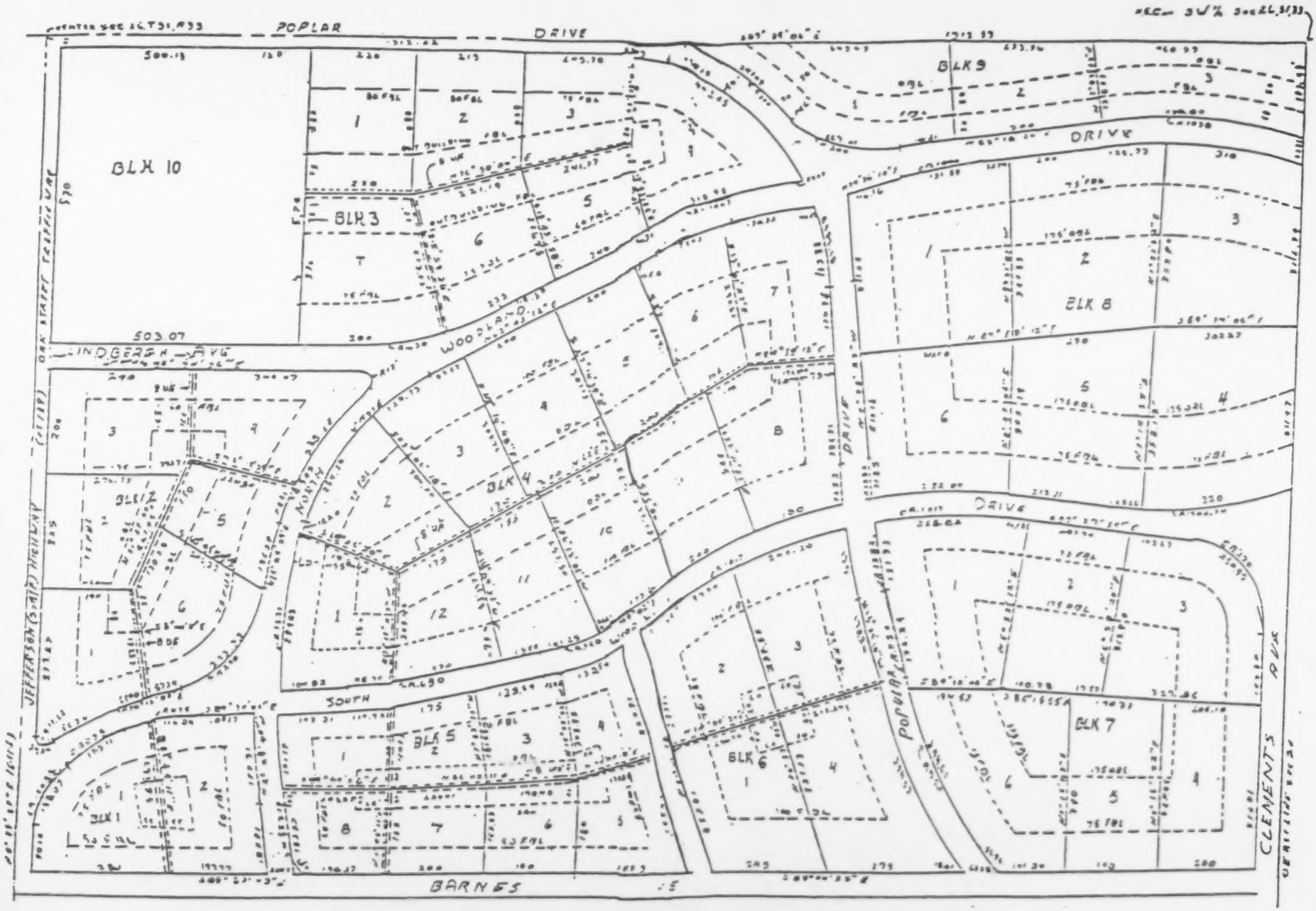

OAKWOOD FIRST ADDITION

CLAY CO. ABSTRACT CO.

Liberty, Missouri

scale 1" = 200'

C.L.J. 9-13-28 Plat Bk. 5 page 66 #67

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